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Contractual Fairness at the Crossroads

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ABSTRACT: In *Beadica 231 CC v Oregon Trust* the Constitutional Court set out to clarify the law on contractual fairness controls, which have been hotly contested between it and the Supreme Court of Appeal ('SCA'). In this article I assess the *Beadica* judgment and its likely effects. The Court sounds some notes of caution in applying the test set out in *Barkhuizen v Napier* and narrows its controversial judgment in *Botha v Rich NO*. It also claims that the widely perceived divergence between it and the SCA is more apparent than real. I welcome the narrowing of *Botha*, but argue that important differences between the two courts remain. And though the *Beadica* judgment suggests the Court will now be more cautious than it once was about applying *Barkhuizen*, there are also reasons to doubt the judgment marks a lasting retreat. Most importantly, in *AB v Pridwin Preparatory School*, decided on the same day as *Beadica*, the Court created a new basis upon which to intervene in contractual disputes. To the extent that the Court continues to rely upon that new basis, any restraints on the application of *Barkhuizen* may be outflanked.

KEYWORDS: contract law, fairness, public policy, application of constitutional rights

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On 17 June 2020, the Constitutional Court decided two contractual disputes: *AB v Pridwin Preparatory School*[1] and *Beadica 231 CC v Trustees of the Oregon Trust*.[2] In both cases, the respondent had sought to bring the parties' contract to an end by relying on its strict terms. In both cases, the applicant resisted this by relying on constitutional imperatives. The judgment in *Beadica* is a significant waypoint, and perhaps a watershed, in the development of contractual fairness controls. It is the main subject of this article. *Pridwin*, by contrast, manages to say almost nothing about contract law. Of that, more later.

I INTRODUCTION[3]

A *Beadica*

The applicants in *Beadica* were small black-owned businesses which rented out building equipment in Cape Town. They were founded using money provided by the National Empowerment Fund, whose purpose is to facilitate economic participation by black South Africans. They entered into two agreements with a Mr Sale, their former employer, who controlled the two business entities who featured as the respondents. With one, the applicants concluded a franchise agreement for ten years. With the other, they concluded a lease agreement over the premises from which their business was to operate, for an initial five years, with an option to renew for a further five. This option was exercisable, crucially, 'at least six months prior to the termination date' of the initial lease. Seemingly the businesses operated successfully, and each of them purported to exercise the renewal clause as the initial leases drew to a close. The problem was that they sent their written notice four months before the lease expired – not the six months stipulated. Mr Sale did not respond to their written notices until the week before the leases were due to end. He then invoked the contract's terms and required the lessees to vacate.

The lessees went to court seeking a declaration that they had validly renewed their leases, despite their failure to comply with the notice period stipulated in the contract. They pointed out that they were 'unsophisticated' parties who could not be expected to comply with the technical requirements for renewal, that Mr Sale had suffered no prejudice by their delay, and that their ten-year franchise agreement showed that the lease was always expected to continue beyond the first five-year term. The National Empowerment Fund intervened to argue that the failure of the businesses, which was the inevitable consequence of eviction, would be a serious setback to its objectives.

In the Western Cape High Court, Davis J found for the applicants.[4] He acknowledged that their case would fail outright if the strict terms of the lease were enforced. But he said that these must be subjected to 'the doctrine of good faith and fairness'.[5] He sourced this approach in Constitutional Court jurisprudence, especially its 2014 judgment in *Botha v Rich NO*,[6] which

[1] *AB v Pridwin Preparatory School* [2020] ZACC 12, 2020 (5) SA 327 (CC) ('*Pridwin CC*').

[2] *Beadica 231 CC v Trustees for the time being of the Oregon Trust* [2020] ZACC 13, 2020 (5) SA 247 (CC) ('*Beadica CC*').

[3] Here I am drawing upon E Cameron and L Boonzaier 'Venturing beyond Formalism: The Constitutional Court of South Africa's Equality Jurisprudence' (2020) 84 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 786, 818–834.

[4] *Beadica 231 CC v Trustees of the Oregon Trust* [2017] ZAWCHC 134, 2018 (1) SA 549 (WCC) ('*Beadica HC*').

[5] Ibid at para 30.

[6] *Botha v Rich NO* [2014] ZACC 11, 2014 (4) SA 124 (CC) ('*Botha*').

he understood to lay down a 'principle of proportionality' in the exercise of contractual rights.[7] In Davis J's view, the consequences of Mr Sale's insistence on the strict terms of the renewal clause would be calamitous for the applicants – their businesses would collapse – and set back the National Empowerment Fund's objectives.[8] Moreover, the sole reason for this would be the applicants' failure to give the full six months' notice, but only four: a technical slip on their part, and one readily understood given that 'they were not sophisticated business people' and did not fully understand their contractual rights and obligations.[9] Hence to insist on the strict terms would be punishingly and 'disproportionate[ly]' rigid.[10] It would allow Mr Sale to 'pursu[e] his own self-interest without regard to the other party's interest' – exactly the kind of conduct that *Botha* said ought, in our constitutionalised contract law, to be restrained.[11] Davis J therefore declared that the option to renew the lease agreements had been validly exercised.

The Supreme Court of Appeal ('SCA') took a very different view.[12] Lewis JA (with Cachalia, Saldulker, Mbha, and Schippers JJA concurring) sought to dismantle Davis J's judgment in systematic detail. She could find no sound basis for his decision. He had analogised his intervention to the application of the old *exceptio doli generalis*, for example, which he took to show that South African courts have long 'ameliorat[ed] the strictness of a legal rule' in the name of equity.[13] But Lewis JA said the *exceptio* had been invoked successfully only rarely, and had been abandoned altogether in the *Bank of Lisbon* case.[14] The famous judgment in *Sasfin (Pty) Ltd v Beukes*,[15] decided shortly after *Bank of Lisbon*, had invalidated a contract on the basis that it was 'contrary to public policy'. But its facts were 'unusual', Lewis JA said, and it applied a much higher bar than Davis J's standard of mere 'unfairness'.[16] Moreover, there is a pressing policy concern that strongly favours adherence to the strict rules of contract law: legal certainty.[17] This is vitally important to commerce, and an incident of the rule of law, which is destroyed when rules are subjected to judicial discretion.[18] Davis J had ignored these sound propositions, Lewis JA said, even though they had been endorsed in SCA precedents which were binding upon him.[19] She then laid out the SCA jurisprudence on the control of contract terms, including three judgments given in the previous two years.[20] The crucial lesson she drew is that 'although fairness and reasonableness inform policy they are not self-standing principles'.[21]

7 *Beadica HC* (note 4 above) at para 35.

8 Ibid at para 39.

9 Ibid at para 37.

10 Ibid at para 42.

11 *Botha* (note 6 above) at para 46. Davis J refers to this passage in *Beadica HC* (note 4 above) at paras 32, 40.

12 *Trustees for the time-being of Oregon Trust v Beadica 231 CC* [2019] ZASCA 29, 2019 (4) SA 517 (SCA) ('*Beadica SCA*').

13 *Beadica HC* (note 4 above) at para 12.

14 *Beadica SCA* (note 12 above) at para 19, citing *Bank of Lisbon and South Africa Ltd v De Ornelas* [1988] ZASCA 35, 1988 (3) SA 580 (A) ('*Bank of Lisbon*').

15 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) ('*Sasfin*').

16 *Beadica SCA* (note 12 above) at para 28.

17 Ibid at paras 26, 35.

18 Ibid at para 24, quoting *Bredenkamp v Standard Bank of South Africa Ltd* [2010] ZASCA 75, 2010 (4) SA 468 (SCA) ('*Bredenkamp*') at para 39.

19 *Beadica SCA* (note 12 above) at para 25.

20 Ibid at paras 27–34. The three cases are *Roazar CC v Falls Supermarket CC* [2017] ZASCA 166, 2018 (3) SA 76 (SCA); *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* [2017] ZASCA 176, 2018 (2) SA 314 (SCA) ('*Mohamed's Leisure*'); *AB v Pridwin Preparatory School* [2018] ZASCA 150 ('*Pridwin SCA*').

21 *Beadica SCA* (note 12 above) at para 35.

That is consistent with the SCA's jurisprudence. But it is not easily reconciled with the Constitutional Court's judgment in *Botha*, on which Davis J heavily relied. That gave Lewis JA an opportunity to malign *Botha*, which had, she said, been 'severely criticised'.[22] She quoted the view of Dale Hutchison, a foremost contract lawyer, that the decision was 'embarrassingly poor'.[23] She also quoted approvingly the criticisms of it by Malcolm Wallis, a senior SCA colleague, who said *Botha* created unacceptable uncertainty.[24] And she described the proposition on which Davis J had taken *Botha* to rest – that a court will not impose a 'disproportionate' consequence upon a contracting party – as 'entirely alien to South African contract law'.[25] The upshot, for Lewis JA, was that *Botha* was irrelevant. She did not mention it again – just as it had not been mentioned in the three SCA judgments on which her excursus was based.[26] In applying these precedents, Lewis JA found no public policy basis upon which to aid the applicants.[27] True, the lapse of the lease would have severe consequences for them. But they were the authors of their own misfortune: 'it was the [applicants], through non-compliance with the renewal clause, who jeopardized their businesses'.[28] So Lewis JA upheld the appeal and ordered Beadica's eviction.[29]

The difference between the High Court and SCA judgments was therefore marked. Davis J, applying Constitutional Court jurisprudence, thought he was entitled to ameliorate the strict terms of the lease for the sake of fairness. Lewis JA, applying the principles the SCA has repeatedly set out, said there was no basis in South African law for a judge to do this. And she castigated Davis J for ignoring the SCA precedents – even as she herself defied *Botha*, a binding judgment of the country's highest court.

B Its background

The stakes were high, therefore, when *Beadica* was appealed to the Constitutional Court. They were high also in the appeal in *Pridwin*, for closely related reasons. For it was in *Pridwin* that the SCA, per Cachalia JA, had provided the succinct statement of its jurisprudence that Lewis JA applied in *Beadica*.

This is what Cachalia JA said:[30]

(i) Public policy demands that contracts freely and consciously entered into must be honoured;
(ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;
(iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;

[22] Ibid at para 17.

[23] D Hutchison 'From Bona Fides to Ubuntu: The Quest for Fairness in the South African Law of Contract' (2019) *Acta Juridica* 99, 117, cited in *Beadica SCA* (note 12 above) at para 37.

[24] *Beadica SCA* (note 12 above) at paras 37–38, citing M Wallis 'Commercial Certainty and Constitutionalism: Are They Compatible?' (2016) 133 *South African Law Journal* 545.

[25] *Beadica SCA* (note 12 above) at para 38.

[26] Consider note 20 above. And see now *Four-Wheel Drive Accessory Distributors CC v Rattan NO* [2018] ZASCA 124, 2019 (3) SA 451 (SCA) at paras 25–29; *SAMWU Provident Fund v Umzimkhulu Local Municipality* [2019] ZASCA 41 at paras 51–53.

[27] *Beadica SCA* (note 12 above) at paras 39–46.

[28] Ibid at para 44.

[29] Ibid at para 47.

[30] *Pridwin SCA* (note 20 above) at para 27.

(iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;
(v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;
(vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.

Applying that approach, Cachalia JA found – much like Lewis JA later would in *Beadica* – that there was simply no basis upon which to assist the applicants, though they had invoked constitutional rights in seeking to restrain the respondent's purported termination of the parties' contractual relationship.[31] And he also repeated the SCA's time-honoured view that 'fairness and reasonableness are not free-standing grounds to impugn the terms of a contract'.[32] It was therefore irrelevant that the termination might have been harsh or 'unfair'; the applicants had to point to some compelling policy consideration in their favour, and this they had not done.

The SCA and Constitutional Court agree, by and large, about points (i) to (iv) in Cachalia JA's summary.[33] They are embodied in *Barkhuizen v Napier*,[34] the Constitutional Court's founding judgment on this topic, delivered in 2007, which has been accepted many times by the SCA.[35] The case was about the enforceability of a clause in a consumer insurance contract that imposed a time limit on the insured's right to sue. Ngcobo J's majority judgment holds that courts ought to control such terms using their power to invalidate terms that are contrary to public policy.[36] This power in fact predates *Barkhuizen* by at least a century,[37] but that judgment gave it new force.

What new force did *Barkhuizen* give? That is where the dispute lies. Cachalia JA's points (v) and (vi) are attempts to curtail it. Point (vi) is especially striking. It states that fairness and reasonableness are not directly applicable tests for controlling contract terms. Yet here is what *Barkhuizen* says:

> In general, the enforcement of an unreasonable or unfair time limitation clause will be contrary to public policy. ... Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy considers the necessity to do simple justice between individuals.[38]
>
> There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause.[39]

The Court went on to say repeatedly that the enquiry before it is whether the enforcement of the clause would be 'unfair' to the applicant 'and thus contrary to public policy'.[40]

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[31] Ibid at paras 75–80. I discuss the facts of *Pridwin* more fully in part IVB below.

[32] Ibid at para 76.

[33] A partial exception may be the phrase, 'inimical to a constitutional value or principle', since the whole issue hinges on what 'values or principles' are included. I discuss this in part IIE2 below.

[34] *Barkhuizen v Napier* [2007] ZACC 5, 2007 (5) SA 323 (CC).

[35] Consider especially *Bredenkamp* (note 18 above).

[36] The majority would not have intervened, however, on the facts of *Barkhuizen*. A minority of three judges (Moseneke DCJ, Mokgoro J, and Sachs J) would have.

[37] The canonical judgment is that of Innes CJ in *Eastwood v Shepstone* 1902 TS 294.

[38] *Barkhuizen CC* (note 34 above) at para 51.

[39] Ibid at para 56.

[40] Ibid at paras 84–86.

So point (vi) is not uncontroversial. The same is true of the famous phrase echoed by both Cachalia JA in *Pridwin* and Lewis JA in *Beadica*: that reasonableness and fairness are not 'self-standing' or 'free-floating' grounds that may be used to control contract terms.[41] This view derives from SCA judgments given *before* the decision in *Barkhuizen*.[42] These said that, although reasonableness and fairness 'underlie and inform the substantive law of contract',[43] they do not 'constitute independent substantive rules that courts can employ to intervene in contractual relations'; 'they cannot be acted upon by the courts directly'.[44] But the correctness of that view is open to doubt after *Barkhuizen*, which instates reasonableness and fairness as the directly applicable tests. Or so one would think.

The explanation of Cachalia JA's point (vi), and of the SCA's continued post-*Barkhuizen* insistence that reasonableness and fairness are not 'free-floating', is that the SCA has undertaken a concerted 'reading down'[45] of the *Barkhuizen* judgment since it was given. The two key protagonists are Harms DP and Brand JA, who sought to preserve the approach they had themselves laid down in the SCA prior to *Barkhuizen*.[46] Their main containment strategies – to be discussed more fully later[47] – are these:

(1) First, they have said that the passages of *Barkhuizen* quoted above must be viewed in their context. They appear only *after* Ngcobo J had determined that the contractual clause at issue infringed the applicant's constitutional right of access to court.[48] The fairness test was his means of adjudicating whether that rights-limitation, once established, makes the term contrary to public policy and thus invalid. So *Barkhuizen* in effect endorses a *conditional* fairness test: it comes off the shelf only if a constitutional rights-infringement has been established. This is the interpretation defended by Harms DP in *Bredenkamp v Standard Bank*,[49] the SCA's first judgment on contractual fairness post-*Barkhuizen*. The SCA has repeatedly cited it since, including in Cachalia JA's principles (ii) and (iii).[50]

(2) Second, they have said that *Barkhuizen*, despite appearances, did not intend to depart from the law as the SCA had set it out in the years prior. This is because *Barkhuizen* did not expressly overrule any of the SCA's judgments. In fact it agreed with the SCA's important statement that 'good faith is not a self-standing rule, but an underlying value'.[51] 'Unless and until the Constitutional Court holds otherwise', therefore, the law is as stated by

[41] *Pridwin SCA* (note 20 above) at para 76; *Beadica SCA* (note 12 above) at para 35.

[42] *Brisley v Drotsky* [2002] ZASCA 35, 2002 (4) SA 1 (SCA) at para 22 made this point in relation to good faith, citing D Hutchison 'Good Faith in the South African Law of Contract' in R Brownsword, NJ Hird and GG Howells (eds) *Good Faith in Contract: Concept and Context* (1999). See also para 70 (Olivier JA). The point was repeated in *Afrox Healthcare Bpk v Strydom* [2002] ZASCA 73, 2002 (6) SA 21 (SCA) ('*Afrox*') at para 32; *South African Forestry Co Ltd v York Timbers Ltd* [2004] ZASCA 72 ('*SAFCOL*') at para 27.

[43] Hutchison 'Good Faith' (note 42 above) at 743–744.

[44] *SAFCOL* (note 42 above) at para 27.

[45] See Hutchison 'From Bona Fides to Ubuntu' (note 23 above) at 115.

[46] Between them Brand JA and Harms DP wrote the main judgments in each of *Brisley v Drotsky*, *Afrox*, and *SAFCOL*.

[47] Consider part IID below.

[48] Constitution of the Republic of South Africa, 1996, s 34. See *Barkhuizen CC* (note 34 above) especially at paras 46–49.

[49] *Bredenkamp* (note 18 above). This reasoning was prefigured, however, by F Brand in 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' (2009) 126 *South African Law Journal* 71, 85.

[50] Now consider *Pridwin SCA* (note 20 above) at para 29(ii)–(iii).

[51] *Barkhuizen CC* (note 34 above) at para 82, citing *Brisley v Drotsky* (note 42 above) at para 32.

the SCA prior to *Barkhuizen*.[52] And hence, notwithstanding the passages of *Barkhuizen* I quoted above, 'a court cannot refuse to give effect to the implementation of a contract simply because that implementation is regarded by the individual judge to be unreasonable and unfair.'[53] This is the position taken by Brand JA in two judgments he gave in 2011, *Maphango v Aengus Lifestyle Properties* and *Potgieter v Potgieter NO*,[54] the latter of which Cachalia JA cites in support of his point (vi).[55]

These containment strategies are, in part, mutually supportive. But the second strategy, owed to Brand JA, is much more far-reaching. If taken seriously, it means we do not need to update our understanding of South African contract law in light of *Barkhuizen* at all. Harms DP's strategy, by contrast, accepts that *Barkhuizen* has effected a significant change, since it allows contract terms to be tested for fairness. But it contains the fairness test by insisting on a precondition.

In any event, both strategies seemed to be confounded by the Constitutional Court's judgment in *Botha*.[56] Judges Harms and Lewis had already sounded the alarm extra-curially[57] after the Court had remarked in *Everfresh* that it is 'necessary to infuse the law of contract with constitutional values, including values of ubuntu', and that '[c]ontracting parties certainly need to relate to one another in good faith'.[58] But *Botha* went further.

The applicant in the case, Ms Botha, was the hire-purchaser of premises on which she ran a laundry business. After she had fallen into several months' arrears, and ignored the seller's entreaties, the seller sought to cancel the contract, invoking the agreed cancellation clause. Ms Botha resisted on the basis that it would be unfair to evict her, citing 'the *Barkhuizen* principle'.[59] This was because she had already paid well over half the purchase price for the property, and had thus acquired a right under the Alienation of Land Act to have the property transferred into her name.[60] Cancellation would unfairly strip her of that right, she said. And the Constitutional Court agreed. It made no finding that the applicant's constitutional rights were infringed.[61] It said the basis for restraining the seller's cancellation was simply 'fairness'.[62] It located the unfairness in the 'disproportionate' consequences of cancellation in the circumstances of the case[63] (which Davis J later treated as a generally applicable yardstick

[52] *Maphango v Aengus Lifestyle Properties* [2011] ZASCA 100, [2011] 3 All SA 535 (SCA) ('*Maphango*') at para 25. See also *Potgieter v Potgieter NO* [2011] ZASCA 181 at para 34.

[53] *Maphango* (note 52 above) at para 25.

[54] Ibid at paras 22–25; *Potgieter* (note 52 above) at paras 31–34. He has elaborated on his views extra-curially: see Brand 'The Role of Good Faith' (2009) (note 49 above); Brand 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: A Further Instalment' (2016) 27 *Stellenbosch Law Review* 238.

[55] *Pridwin SCA* (note 20 above) at para 27 fn 12.

[56] *Botha* (note 6 above).

[57] C Lewis 'The Uneven Journey to Uncertainty in Contract' (2013) 76 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 80; LTC Harms 'The Puisne Judge, the Chaos Theory and the Common Law' (2014) 131 *South African Law Journal* 3. See also Wallis (note 24 above) at 557–559.

[58] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30, 2012 (1) SA 256 (CC) at paras 71–72.

[59] *Botha* (note 6 above) at para 15.

[60] Act 68 of 1981, s 27.

[61] There are some passing references to the applicant's invocation of constitutional rights: *Botha* (note 6 above) at paras 15, 19. But there is no further discussion of this by the Court.

[62] Ibid at paras 21, 24, 49–51.

[63] Ibid at paras 49–51.

in *Beadica*).[64] The judgment does not mention *Bredenkamp*, *Maphango* or *Potgieter*,[65] but its approach seems inconsistent with all of them, since it treats fairness as a standard that is directly and unconditionally applicable to restrain any reliance on one's contractual rights. Hence the uneasy truce that once held between the two courts could no longer be sustained. The SCA's judgments had insisted upon principle (vi), but *Botha* was understood to defy it.

Moreover, the Constitutional Court's conclusion that cancellation would be unfair seemed to be the kind of 'idiosyncratic inference of a few judicial minds' that Cachalia JA's point (v) deplores. No doubt cancellation would be harmful to Ms Botha – but what of the interests of the seller? The Court was 'almost cavalier' in sweeping these aside.[66] Ms Botha had repeatedly failed to meet her contractual debts, ignored the seller's demands to make amends, and by the time of the Court's judgment had occupied the seller's property rent-free for seven years. The seller was seeking a remedy for this, in reliance on the contractual provisions to which Ms Botha had agreed. But none of that seemed to concern the Court (which also made no provision for payment to the seller of interest). 'Frankly', wrote Wallis, 'it is difficult to see on what basis that was fair.'[67]

As we have seen, the SCA did not accede to *Botha*'s adventurous new approach.[68] Because *Botha* does not mention the SCA precedents, Fritz Brand (by then retired) was still clinging to the view that it could not have overruled them; these must, then, remain valid.[69] Carole Lewis, however, who now took centre stage as the SCA's senior contract lawyer and an established opponent of the Constitutional Court's jurisprudence,[70] was more candid. In her *Beadica* judgment she rejected *Botha* not because it was (supposedly) consistent with the SCA's prior judgments, but because it was wrong. She instead applied the opposite approach summarised by Cachalia JA in *Pridwin*, which allowed her to dismiss the applicants' case with ease; and she found no common ground at all with the approach that Davis J had sourced in the jurisprudence of the Constitutional Court. And this was part of a pattern. Though *Beadica* was eye-catching for the frankness with which Lewis JA expressed her scorn, several prior SCA judgments (including *Pridwin*) had already restated the law impervious to the Court's approach.[71] Predictably, this created problems for lower courts. Some of Davis J's colleagues said his reasoning in *Beadica* was 'disturbing' and refused to follow it, preferring the jurisprudence of the SCA.[72] Others, however, continued to apply Davis J's approach – even after Lewis JA had condemned it.[73] After all, Davis J's approach was itself sourced in the 'unambiguous' precedents of the Constitutional Court, which are binding even upon the SCA.[74]

With our two highest courts at loggerheads, then, producing irreconcilable results, there was 'the urgent need for strong leadership and a definitive ruling on the matter by

[64] See note 7 above.

[65] It cites only two SCA judgments in total, both on the *exceptio non adimpleti contractus*: *Botha* (note 6 above) at para 43 fn 62.

[66] Hutchison 'From Bona Fides to Ubuntu' (note 23) at 120.

[67] Wallis (note 24 above) at 557.

[68] For criticism of the SCA's response see Cameron and Boonzaier (note 3 above) at 833–834.

[69] Brand 'The Role of Good Faith' (2016) (note 54 above) at 247.

[70] Lewis (note 57 above).

[71] These were cited at note 20 above.

[72] *Gouws NO v BBH Petroleum (Pty) Ltd* [2019] ZAGPPHC 1075, 2020 (4) SA 203 (GP) at paras 57, 62.

[73] *Atlantis Property Holdings CC v Atlantis Excel Service Station CC* [2019] ZAGPPHC 150, 2019 (5) SA 443 (GP).

[74] Ibid at paras 40, 45.

the Constitutional Court'.[75] That is the background against which the Court considered the appeals in both *Pridwin* and *Beadica*. They were heard several months apart, but handed down on the same day[76] – a signal that the Court was trying to get all its ducks in a row, before settling the issue of fairness in contract in one fell swoop.

II THE PRINCIPLES

The question facing the Constitutional Court was whether Beadica[77] had validly renewed its lease with Mr Sale, despite its clear failure to comply with the terms of the renewal clause. Beadica argued that the strict application of these terms would be contrary to public policy and constitutional values. It relied heavily upon the Court's own judgments, especially *Barkhuizen* and *Botha*, to which it urged an expansive interpretation, and criticised their side-lining by the SCA.[78] Mr Sale,[79] by contrast, argued that the Court's judgments did not licence an approach radically different from the SCA's, and that courts have no general power to override the contract's agreed terms merely because of the severe consequences.[80] In any event, he said, echoing Lewis JA, Beadica's unexplained failure to comply with the specified notice period was its own responsibility, not something from which the Court ought to rescue them.

The Court split 7:3. The majority, led by Theron J,[81] dismissed the appeal from the SCA, with whose approach she found much common ground. The minority, by contrast, led by Froneman J,[82] would have held in favour of Beadica, on the basis of an approach that chimes with Davis J's. Several aspects of the majority judgment are noteworthy.

A Responsibility

First, the Court owned its responsibility to provide clear guidance about fairness in contract. It situated its decision in the context of the ongoing Constitutional Court–SCA feud, noted the extensive criticism of its own judgment in *Botha*, and proclaimed the importance of providing a resolution.[83] And it engages at length with both courts' jurisprudence and the academic commentary, confident that all of it is worth taking seriously.[84]

[75] Hutchison 'From Bona Fides to Ubuntu' (note 23 above) at 101.

[76] *Pridwin* was decided over a year after it was heard – a uniquely long lapse. It was therefore foregrounded in some media critiques of the Court's sluggishness: T Broughton 'ConCourt efficiency is declining' *GroundUp* (17 August 2020); Professor Balthazar 'South Africa's profound institutional failure' *Daily Maverick* (18 August 2020). The wider critique is justified, but *Pridwin* may not be the cleanest illustration: it seems likely that the delayed hand-down is explained by a desire that it coincide with *Beadica* (which was heard six months later).

[77] Strictly speaking there were four applicants, each an equivalently situated separate corporate entity. For simplicity I will refer to them collectively as 'Beadica' in the singular.

[78] The applicants' written submissions are available at https://collections.concourt.org.za/bitstream/handle/20.500.12144/36616/Applicants%27%20Heads%20of%20Argument.pdf?sequence=16&isAllowed=y.

[79] The respondents were the two corporate entities (Beadica's lessor and franchisor respectively) which Mr Sale controls.

[80] Consider the respondent's written submissions, available at https://collections.concourt.org.za/bitstream/handle/20.500.12144/36616/First Respondent%27s Heads of Argument.pdf?sequence=20&isAllowed=y.

[81] Khampepe ADCJ, Jafta J, Majiedt J, Mathopo AJ, Mhlantla J and Tshiqi J concurred.

[82] Madlanga J concurred in Froneman J's judgment. Victor AJ wrote a separate dissent which finds much common ground with Froneman J.

[83] *Beadica CC* (note 2 above) at paras 17–19.

[84] Ibid at paras 20–60; see also para 17 fns 22–23.

These might seem like obvious tasks for an apex court. But they were things it failed to do in *Botha*, which cited not a single SCA judgment on fairness in contract, even while endorsing an approach that seemed flatly inconsistent with them. Nor did it note any complexities about the proper reach of the *Barkhuizen* principle, even as the Court expressed it in terms that were alarmingly broad. To some extent, this may have reflected a lack of awareness about how contested the existing jurisprudence had been.[85] On the other hand, some of the Court's wider remarks about the need to give our contract law a shake-up may have suggested that its disregard for the SCA precedents was deliberate.[86] Either way, post-*Botha* developments did not presage a détente. The Court's critics, as we saw, became all the more hostile, and in *Beadica* Lewis JA foreswore any attempt to honour its jurisprudence – which may well have drawn an equally hot-headed response from the Court. Lewis JA's endorsement of the view that *Botha* was 'embarrassing',[87] in particular, seemed likely to attract a slap-down.

And certain prominent public statements did not augur well. The Judicial Service Commission interviews held in April 2019 (that is, shortly before the appeals in *Pridwin* and *Beadica* were heard) seemed to display the Court's lack of interest in, and even contempt for, opposition to its contract-law judgments.[88] One commissioner – tellingly, it was Judge Cachalia[89] – asked the candidates for appointment to the Court whether they were aware of academic criticism of the Court's judgments in private and commercial law (including in contract law, which Cachalia at one point singled out). Though each of the candidates he asked had acted on the Court, and were now seeking permanent appointment to it, they all said they were entirely unaware of any such criticism.[90] Moreover, this was not regarded by the other commissioners as a worrying admission. Quite the contrary: Chief Justice Mogoeng intervened to warn judges against reading academic criticism, since it might unduly influence them to the detriment, he implied, of judicial independence.[91] He also rejected the criticisms of the Court's judgments in contract law specifically: intervening to offer his own response to Cachalia's question, he explained that these criticisms are borne of the view that contract law is 'untouchable' and should be insulated from constitutional values; this means you are 'in for

[85] For what it's worth, neither party in *Botha* mentioned *Bredenkamp* (or any other post-*Barkhuizen* case law) in their written submissions. Both quoted *Barkhuizen* extensively and took it at face value; their disagreement was only about how to apply it to the facts.

[86] Some passages in *Everfresh* and *Botha*, for example, suggested a new dawn, including 'the development of a new constitutional contractual order': *Everfresh* (note 58 above) at paras 22–24, 36, 71–72; *Botha* (note 6 above) at para 46.

[87] Note 23 above.

[88] The interviews are transcribed at www.judgesmatter.co.za/interviews/april-2019-interviews/transcripts-april-2019. (The references in the footnotes below are to these transcriptions.) And see for discussion N Tolsi 'JSC confounds at ConCourt interviews' *New Frame* (5 April 2019) available at www.newframe.com/jsc-confounds-concourt-interviews; F Rabkin 'SCA tensions dominate at interviews' *Mail & Guardian* (5 April 2019) available at mg.co.za/article/2019-04-05-00-sca-tensions-dominate-at-interviews.

[89] He was sitting on the Commission only fortuitously, after Mandisa Maya, President of the SCA, had had to recuse herself for unrelated reasons.

[90] These candidates were Annali Basson, Patricia Goliath, and Jody Kollapen. The same topic arose in Fayeeza Kathree-Setiloane's interview, but she was not directly questioned on it.

[91] Goliath interview at 11; Kollapen interview at 8–9. Another commissioner, Dali Mpofu SC, said that academic complaints about the Court's judgments in commercial law 'must be rejected with contempt' (Kathree-Setiloane interview at 29), and later described the existence of commercial law as a 'myth', since all law in South Africa is subject to the Constitution (ibid at 29, 33).

a hiding if you are ever going to try and tamper with it'.[92] Mogoeng did not give Cachalia the opportunity to ask his question to the last two candidates.[93]

In short, whether as a result of ignorance or ill-will, the Court's judges seemed unlikely to treat the SCA jurisprudence, or the criticism of the Court's own approach, as worthy of engagement and accommodation. It seemed they might forge ahead with all the more certitude. And the first important thing to say about *Beadica*, then, is that these fears have not materialised. The judgment in *Beadica* engages closely with the academic commentary and jurisprudence of the SCA and accepts the need to placate the discord.

B Retreat

Second, the pointed manifestation of this conciliatory attitude is a clear climbdown from the heights of *Botha* – or at any rate from the expansive view of that judgment that had been taken by most commentators. Theron J says the judgment must be understood narrowly; it therefore does not effect the great change to the law that its critics thought.[94]

Her explanation is that *Botha* was about a 'unique statutory context', namely the sale of property in instalments under the Alienation of Land Act.[95] It was only to give effect to that Act, and in particular to preserve Ms Botha's right to transfer of the property under section 27 of it, that the Court restrained the seller's purported cancellation of the contract of sale. It follows, for Theron J, that much of the commentary on *Botha* was mistaken: it assumed that the judgment is authority for the general proposition that the termination of a contract will be restrained if it would be 'disproportionate or unfair in the circumstances'.[96] But this assumption, she says, 'is based on a misreading of the *ratio decidendi* in *Botha* and rests on a misconception of what that case was about'.[97] For the same reason, the SCA judgment in *Beadica* was 'unfortunate'.[98] It assumed an ungenerous and extreme reading of *Botha* and on that basis maligned and marginalised it. But Lewis JA could simply have distinguished it – neither the Alienation of Land Act nor any other statute was at issue in *Beadica* – and thus avoided any clash between the two courts' precedents. Theron J herself, having interpreted *Botha* in this way, clearly regards it as irrelevant and unavailing to Beadica's case.[99]

Theron J presents all this as a straightforward reading of what *Botha* said. It is not. The wide interpretation may ultimately be mistaken,[100] but there was surely a basis for it in the Court's reasoning. *Botha* contains some sweeping statements, and a range of commentators took them at their word. High Court judges did the same. And we should note that even the SCA has on occasion applied the wide reading. Though, as we saw, many of its judges have rejected *Botha*, they have not been able to corral all their colleagues. *Botha* was unhesitatingly applied by the SCA in *Louw v Davids*, for example, to justify the court's refusal to allow the cancellation of a

[92] Goliath interview at 26.

[93] As it happens, these were the two candidates ultimately appointed to the Court, Zukisa Tshiqi and Steven Majiedt, who therefore sat on *Beadica*. And, as it turned out, Mogoeng CJ was absent from *Beadica*.

[94] See *Beadica CC* (note 2 above) at paras 44–59.

[95] Ibid at para 56.

[96] Ibid at para 59.

[97] Ibid at para 59.

[98] Ibid at para 60.

[99] It is not mentioned again, except once, to underscore Theron J's narrow interpretation: ibid at para 79.

[100] I argued as much in L Boonzaier 'Rereading Botha v Rich' (2020) 137 *South African Law Journal* 1.

contract since it would be, in the circumstances, 'disproportionate'.[101] The bench was unusually composed in that case (featuring three acting judges, including a certain Davis AJA), and the result could have been justified on independent grounds;[102] but the point stands. Theron J has, in truth, deliberately distinguished *Botha*, rather than giving simple effect to its wording, and has thereby changed the law that some High Courts, and sometimes the SCA, were applying. In my view, she was right to do this – but we should be clear about what she was doing.[103]

The Court's authoritative narrowing of *Botha* should be welcomed, I think, regardless of partisan affiliation. Even if one favours much more robust controls over contractual fairness, *Botha* would, on its orthodox interpretation, have made it very difficult for the law to develop these in a way that is rationally accountable.[104] *Botha* failed to engage with legitimate and important questions about the proper scope of *Barkhuizen*, even as it seemed to assume highly contentious answers to them. To underscore a point made earlier, *Botha* did not mention Harms DP's interpretation in *Bredenkamp* – by far the most significant and considered judicial discussion of *Barkhuizen* – even though the judgment seemed to defy it, since it made no mention of any constitutional rights of Ms Botha that were threatened by the Trust's cancellation.[105] Even apart from this, the application of the principle asserted in *Botha* was most puzzling. The *Barkhuizen* test can, in principle, be filled out with objectively discernible criteria, so that greater fairness is introduced into our contract law *without* generating haphazard and inscrutable results. But in *Botha* no such criteria could be discerned. Nor did the Court seem to think it owed any. Even those who had once strongly supported the Court's attempts to constitutionalise our contract law said they were now perturbed.[106]

After *Botha*, in short, we seemed to be on a runaway train. But *Beadica* shows that there is someone at the controls, and with a willingness to apply the brakes. We now have a much-needed opportunity, one hopes, to pause and reflect.

C Rhetoric

The third noteworthy point about the *Beadica* judgment is that it has, in its rhetoric, retreated still further from the strongly pro-fairness stance of *Botha*. But at this point my assessment of the judgment becomes more mixed, for a number of reasons.

[101] *Louw v Davids* [2018] ZASCA 70 at para 30.

[102] Plasket AJA acknowledged this at para 22.

[103] The Court's attempt to shift the blame for the impression that its judgment created brings to mind *Gcaba v Minister for Safety and Security* [2009] ZACC 26, 2010 (1) SA 238 (CC) in which Van der Westhuizen J implied that a serious inconsistency between two of the Court's prior judgments was merely 'perceived' – a result, he implied, of 'confusion' generated by 'academics'. See especially paras 2, 58.

[104] In addition to the criticisms of Brand, Hutchison, and Wallis already cited in part IB, consider D Bhana and A Meerkotter 'The Impact of The Constitution on the Common Law of Contract: Botha v Rich NO' (2015) 132 *South African Law Journal* 494; R Sharrock 'Unfair Enforcement of a Contract: A Step in the Right Direction? Botha v Rich and Combined Developers v Arun Holdings' (2015) 27 *SA Mercantile Law Journal* 174.

[105] It does gesture vaguely towards some constitutional rights when discussing Ms Botha's arguments (see paras 15, 18), but these are not mentioned again. Nor is any need to establish a constitutional right-infringement acknowledged, the *Barkhuizen* principle instead being presented in wide terms, with 'fairness' the sole yardstick.

[106] D Bhana 'The Constitutional Court as the Apex Court for the Common Law of Contract: Middle Ground between the Approaches of the Constitutional Court and the Supreme Court of Appeal' (2018) 34 *South African Journal on Human Rights* 8, 30. Indeed Lewis JA may have been in an analogous position. She had once argued strongly in favour of greater contractual fairness controls, but seemed to have been scared off by the Constitutional Court's hell-for-leather approach: see Lewis (note 57 above) at 81–82 and her earlier work cited there.

Botha, *Everfresh*, and indeed *Barkhuizen* had emphasised the need for a newly vigorous reworking of our contract law to achieve greater fairness, the consistent implication being that the SCA's approach was too rigid. Change was afoot – and to be celebrated, the Court and its backers suggested, since it would ensure that the values of the Constitution permeate a contract law that was hidebound and out-of-date. Whereas Froneman J's minority judgment in *Beadica* is firmly in this same tradition, Theron J tells a different story. She emphasises continuity with the pre-constitutional era; caution rather than enthusiastic change; and conciliation between the approaches of the Constitutional Court and the SCA.

One notices that something new is in the offing as soon as Theron J begins her historical survey. Whereas Froneman J uses our early case law to show that contract law has always (despite myths about the sanctity of certainty and contractual autonomy) been open to judicially imposed standards of fairness, the lesson Theron J draws from it is that '[a]s far back as the nineteenth century, our courts cautioned that legal certainty would be undermined if free-standing notions of good faith [or reasonableness or equity] were to be adopted'.[107] In most accounts of our more recent jurisprudence, the *Bank of Lisbon* case[108] is regarded as a nadir, since it not only abrogated the *exceptio doli generalis*, which had been used to legitimate the development of equitable contractual doctrines, but refused to accept that the concept of good faith could play a similar role.[109] Yet Theron J gives an uncritical account of the majority judgment (which 'buried' the 'superfluous, defunct anachronism' of the *exceptio doli*) – and mentions neither Jansen JA's celebrated dissent nor the academic outcry.[110] In the later judgment of *Sasfin*,[111] a differently composed Appellate Division used the device of public policy as a new avenue to introduce fairness controls after *Bank of Lisbon*. But Theron J, rather than noting the promise of *Sasfin* for the pursuit of sorely needed contractual fairness,[112] emphasises instead the case's unusually strong facts, as well as the Appellate Division's caution that the courts' power to intervene should be exercised 'sparingly and only in the clearest of cases'[113] – that is, Cachalia JA's point (v) from *Pridwin*.

Thus far, one might conclude that Theron J meant only to provide a staid report of the case law, postponing her critical thoughts for later. But things become more remarkable when Theron J proceeds to discuss the constitutional-era jurisprudence of the SCA and Constitutional Court. Here she leaves a distinctive imprint. In the two courts' jurisprudence she claims to find only harmony – which, to my knowledge, is something no one has ever claimed before. And she suggests a continuing role for the SCA's pre-*Barkhuizen* jurisprudence that would, I think, surprise even the SCA. Its 2003 judgment in *Afrox Healthcare Bpk v Strydom*,[114] for example, which could find no basis to control an exemption clause even in an egregious case, triggered an avalanche of critical commentary. This criticism has been acknowledged by the

[107] *Beadica CC* (note 2 above) at para 22.

[108] *Bank of Lisbon* (note 14 above).

[109] R Zimmermann 'Good Faith and Equity' in R Zimmermann and D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 254–255.

[110] *Beadica CC* (note 2 above) at para 25. Froneman J, by contrast, says '[t]he wisdom of [the *Bank of Lisbon*] decision remains doubtful', and suggests it has left a gap in our contract law: ibid at para 129.

[111] *Sasfin* (note 15 above).

[112] See again Zimmermann (note 109 above) at 259–260.

[113] *Sasfin* (note 15 above) at 9B–C, cited in *Beadica CC* (note 2 above) at para 27.

[114] *Afrox* (note 42 above).

SCA[115] and even by the author of *Afrox*, Brand JA, who seemed to imply that his judgment might have shown a lack of imagination.[116] Despite this, Theron J's own discussion of *Afrox* mentions none of the criticism, and even goes on to suggest that its approach continues to be well-supported.[117] She says something similar about *Afrox*'s immediate precursor, *Brisley v Drotsky*.[118] That judgment's statement of principle seems flatly inconsistent, for reasons I explained earlier, with *Barkhuizen*. Yet Theron J says *Barkhuizen* confirmed it.[119] Later, she presents *Bredenkamp* as a rote application of *Barkhuizen*[120] – rather than the deliberate narrowing that was widely perceived.[121] And finally Theron J comes, as already mentioned, to *Botha*, which she says made no substantial change to our law.[122]

More strikingly still, Cachalia JA's principle (vi) somehow emerges from this potted history entirely unruffled. Theron J indeed repeats that principle throughout; it seems to be the main point she wishes her exposition to establish.[123] This culminates in the following passage:[124]

> Much was made by the applicants in this case of a "divergence" between the approach of this Court and that of the Supreme Court of Appeal to the judicial control of contracts. The "divergence" is said to center on the role of abstract values in our law of contract and whether these values can be directly relied upon to invalidate, or refuse to enforce, contractual terms. This controversy has now been put to rest by the clarification of the law as expressed by this Court in *Barkhuizen* and *Botha*. There is agreement between this Court and the Supreme Court of Appeal that abstract values do not provide a free-standing basis upon which a court may interfere in contractual relationships.

So, in Theron J's telling, there is no difference between the approaches of the two courts. And she reaches this conclusion primarily by downplaying, indeed denying, the novelty of the approach of the Constitutional Court. The last sentence of the quotation is directly traceable to the SCA's judgment in *Brisley v Drotsky* in 2002 – and, if Theron J's judgment is taken at face value, then nothing the Court has said since then has changed the law. Or, at any rate, any changes that have occurred are the modest ones embodied in Cachalia JA's six principles, which, in closing, she approvingly quotes and affirms in full.[125]

Moreover, Theron J seeks to give this restrained approach a normative underpinning. Predictably, she emphasises the importance of *pacta sunt servanda* and commercial certainty. The former has been described, in earlier judgments, as a 'sacred cow',[126] and the latter as a 'shibboleth',[127] both of which are mocking descriptions of the superstitious reverence for the common law of contract that the SCA is thought to exhibit. But in Theron J's account there is no such cynicism. Her invocation of these values is entirely credulous[128] – and indeed she

[115] *Napier v Barkhuizen* [2005] ZASCA 119 at para 8.
[116] Brand 'The Role of Good Faith' (2009) (note 49 above) at 89. Carole Lewis, too, accepts that in this area 'the common law most certainly still requires development to ensure fairness': Lewis (note 57 above) at 83.
[117] *Beadica CC* (note 2 above) at paras 30, 38.
[118] *Brisley v Drotsky* (note 42 above).
[119] *Beadica CC* (note 2 above) at para 38.
[120] Ibid at paras 39–42.
[121] Note 45 above.
[122] Consider again *Beadica CC* (note 2 above) at paras 44–60.
[123] Ibid at paras 22, 29, 38, 40, 42.
[124] Ibid at para 79.
[125] Ibid at para 82. She does add two glosses to the principles, however, which I discuss later.
[126] *Barkhuizen CC* (note 34 above) at para 15. Compare *Bredenkamp* (note 18 above) at para 37.
[127] *Beadica HC* (note 4 above) at para 44.
[128] See *Beadica CC* (note 2 above) especially paras 83–90, 92.

uncynically owns the description of *pacta sunt servanda* as 'sacred'.[129] And uncertainty, she continues, is 'inimical to the rule of law'.[130] We have heard things like this before, including from the Constitutional Court,[131] but even so there is an unmistakable shift of emphasis. Theron J is not merely making a reluctant concession to these imperatives;[132] she is giving them centre-stage. In this reverence for commercial certainty and *pacta sunt servanda*, the Constitutional Court suddenly seems more piously SCA-like than the SCA.

In addition, Theron J pushes these commitments in some relatively novel directions:

> [C]ontractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. ... It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.[133]

And since '[t]he fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country', sanctity of contracts is 'essential' to the constitutional project, which would be 'imperilled' if courts undermine *pacta sunt servanda*.[134]

Later, Theron J pointedly applies this to the case before her. Responding to Beadica's argument that black economic empowerment (BEE) would be set back by allowing Mr Sale to snuff out their business, she says the truth is quite the opposite. It is Beadica's own argument that jeopardises BEE, since upholding it 'would increase the risk of contracting with historically disadvantaged persons'.[135] If courts were loath to enforce contracts against those previously disadvantaged, this might deter other parties from contracting with them in the first place, or cause those other parties to insist on more one-sided terms. 'These outcomes would', Theron J says, 'undermine the very objects that the [National Empowerment] Fund … seek[s] to achieve'.[136]

This reasoning – replete with talk of 'incentives' and the unintended consequences of regulation – is unmistakably indebted to modern economic theories of contract law. Rather than trying to ensure justice *inter partes*, the rules of contract law should be designed to serve as an instrument of economic growth; rather than trying to prevent exploitation by powerful economic actors, the preponderant concern is that those actors might then take their business elsewhere. Whether or not one agrees with this reasoning, it marks a shift. It is not the kind of the thing for which the Court is known. A constitutionalised approach to contract law has hitherto been understood to entail much *more* judicial control of contracts, a much greater willingness on the part of courts to prevent exploitation.[137] Consider, for example, the

[129] Ibid at para 86, quoting *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465.

[130] Ibid at para 81.

[131] *Barkhuizen CC* (note 34 above) at para 57.

[132] Contrast, for example, the merely footnoted acknowledgment of *pacta sunt servanda* in *Botha* (note 6 above) at para 23 fn 38, or Davis J's discussion of the need for legal certainty only to pre-empt an objection: *Beadica HC* (note 4 above) at paras 40–44.

[133] *Beadica CC* (note 2 above) at para 84.

[134] Ibid at para 85.

[135] Ibid at para 101.

[136] Ibid at para 101.

[137] D Moseneke 'Transformative Constitutionalism: Its Implications for the Law of Contract' (2009) 20 *Stellenbosch Law Review* 1; DM Davis and K Klare 'Transformative Constitutionalism and the Common and Customary

following passage of *Botha* – surely this topic's most often quoted piece of judicial rhetoric of the last decade:

> Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests.[138]

To that fraternal proclamation, *Beadica* offers a riposte. Theron J emphasises the perils of enforcing duties of altruism. Moreover, whereas the extremes of the South African context are usually taken to make the need for judicial fairness controls especially pressing,[139] Theron J draws the opposite conclusion: we need the economic growth especially badly; we need to take particular care to stay on the right side of those who might deign to contract with BEE initiatives.

This sudden outbreak of neoliberalism, even within a Court reputed as its enemy, is likely to have commercial practitioners salivating. But what should the rest of us make of all this?

For one thing, we should draw out a point, latent in what I have said so far, about the rise of Justice Theron. She wrote the majority judgments in *Beadica* as well as *Pridwin* (which I am coming to later). Both are about significant issues and have received much attention. Both Theron J's judgments are 'maximalist', in the sense that over the course of a hundred paragraphs she seeks to deal comprehensively with issues of fundamental principle. She is expressly mindful, moreover, of the apex court's power to resolve these in a way that will influence the legal system as a whole.[140] All this is true, too, of her majority judgment in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* the previous year: also 100 paragraphs plus, also expressly mindful of the apex court's power to give guidance, also keen to comprehensively state the law on an issue that had become controversial.[141] These are long and lofty judgments, even by the Court's standards. There is a certain deliberateness about them; they read as though they are written with one eye on history, and of the current Court's place within it.

Theron J's seemingly confident sense of her own role has been impactful, and may become more so. Of the judges whom she failed to persuade in *Beadica* and *Pridwin*, two of them (Cameron J and Froneman J) have since retired. A further two were acting judges (that is, Nicholls AJ, who dissented in *Pridwin*, and Victor AJ, who dissented in *Beadica*). Only Mogoeng CJ, who joined the dissent in *Pridwin*, and Madlanga J, who joined the dissent in *Beadica*, remain permanent members of the Court. With Mogoeng CJ himself notoriously absent from many hearings,[142] and Zondo DCJ on extended leave at the State Capture Commission, there is room for leadership on the Court, and Theron J may, just three years after her appointment, be looking to provide it. She is evidently capable of winning

Law' (2010) 26 *South African Journal on Human Rights* 403 especially at 479–480.

[138] *Botha* (note 6 above) at para 46.

[139] D Davis 'Developing the Common Law of Contract in the Light of Poverty and Illiteracy: The Challenge of the Constitution' (2011) 22 *Stellenbosch Law Review* 845.

[140] *Beadica CC* (note 2 above) at para 18.

[141] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZASCA 15, 2019 (4) SA 331 (CC).

[142] N Tolsi 'Mogoeng absent for more than half of ConCourt judgments' *Mail & Guardian* (16 November 2018). It is possible that Mogoeng CJ, had he sat in *Beadica*, would have been partial to Froneman J's approach: compare his remarks discussed at note 88 above.

majorities,[143] even as she takes sometimes bold approaches,[144] and there are signs her coalition will stay intact.

In sum, Theron J's judgment in *Beadica* suggests a new approach to fairness in contract, which she seeks to supply with intellectual heft; and it managed to secure a majority that prevailed over the outgoing Froneman J. It is tempting, therefore, to read her judgment as a watershed, and perhaps a changing of the guard. The age of the aggressive constitutionalisation of contract law is over; it is now a return to 'business as usual', with the Constitutional Court brought into line with the cautious approach of the SCA.[145]

D Reality

I am sure there is something to this simple picture. But there are wrinkles in it. Though *Beadica* tries to convey an unequivocal message, its legacy is likely to be complex.[146] There are several reasons, to be developed over the course of the remainder of this article, to doubt that *Beadica* marks the lasting retreat towards a cautious, pro-certainty approach that at first it seems. This part discusses the most striking respect in which Theron J's rhetoric fails to persuade. The main message of her judgment is that she has resolved any tension between the jurisprudence of the Constitutional Court and of the SCA; indeed she has shown, she says, that the divergence is 'more perceived than real'.[147] Well, it would be nice if that were true. But it is not.

[143] The contrast with Jafta J's and Zondo J's early years at the Court is plain. Though they were immediately some of the Court's most frequent writers, this was almost always in dissent, indeed often solo. On the other hand, the Court has changed a great deal since then, with the effect that Jafta J has become a stalwart in the Court's main voting bloc (and his erstwhile opponents, Cameron J and Froneman J, were forced into the role of conscientious dissenters). Theron J may now be profiting, in short, from the coalition that Jafta J and Zondo J created.

[144] It may be worth remembering that, even as an acting judge in 2015, Theron J overturned *S v Ndhlovu* [2002] ZASCA 70, [2002] 3 All SA 760 (SCA) a longstanding and widely cited SCA judgment on criminal procedure: see *Mhlongo v S; Nkosi v S* [2015] ZACC 19, 2015 (2) SACR 323 (CC). The judge who decided *Ndhlovu* was Cameron JA, who now sat on the Constitutional Court alongside Theron J. But that did not deter her from holding that *Ndhlovu* was not only wrong but unconstitutional, and claiming it had overlooked a relevant statute.

[145] Since some members of the *Beadica* majority (including Theron J) spent several years at the SCA and participated in the development of its contract-law jurisprudence, it may stand to reason that the Court's approach has now converged. See, for example, *Potgieter* (note 52 above), concurred in by Majiedt JA; *Roazar* (note 20 above), authored by Tshiqi JA and concurred in by Majiedt JA; and *MEPF v SAMWU* (note 26 above) and *Liberty Group Ltd v Mall Space Management CC* [2019] ZASCA 142, 2020 (1) SA 30 (SCA), both concurred in by Tshiqi JA. Mathopo JA, who as an acting judge formed part of the *Beadica* majority, authored the SCA judgment in *Mohamed's Leisure* (note 20 above).

[146] One crucial feature of the wider terrain, though one that is unfortunately beyond the scope of this article, is the Consumer Protection Act 68 of 2008 ('CPA'). Section 48 of that Act gives consumers a clear right to challenge any term of a consumer contract that is 'unfair, unreasonable or unjust' (and the Act gives a raft of other protections besides). Hence the courts now have an indisputable statutory power, in those contracts where it is most needed, to intervene in the name of fairness and reasonableness; and, had the CPA been in force at the time of *Afrox*, *Barkhuizen*, and *Bredenkamp*, the result in each case may well have been different. The CPA has therefore taken much of the normative pressure off the common-law powers of intervention that I am discussing in this article, as well as significantly reducing their practical importance. On the other hand, the common-law powers continue to apply, of course, in contracts not covered by the Act. And what the courts have said about those powers (including in *Beadica*) continues to influence the application of s 48 of the CPA. (See, for a recent example, *Magic Vending (Pty) Ltd v Tambwe* [2020] ZAWCHC 175, 2021 (2) SA 512 (WCC), which I discuss further below.) What is clear is that a full appraisal of fairness in South African contract law would have to attend closely to the CPA, and not only to the common-law rules that I am discussing.

[147] *Beadica CC* (note 2 above) at para 80.

To be sure, Theron J has endorsed a reading of *Botha* that is much narrower than anticipated. To that extent she has, as I said above, offered a very useful clarification, which does quash one source of disagreement between the two courts. But the perceived divergence between them began well before *Botha*, whose excision can therefore only count for so much. What is surprising about Theron J's judgment, after all, is that she professes perfect agreement across *all* of the two courts' judgments in the constitutional era (and maybe even in the pre-constitutional era). And that conclusion is most implausible. The gap between the approaches is real, and very little that Theron J says helps to bridge it. What she does instead is obscure the gap, through fallacy and equivocation.

The first question to which the post-constitutional case law addressed itself was this: Is a court entitled (at any point) to disapply the agreed terms of the contract on the basis that, in the court's judgement, the terms are (perhaps extremely) unreasonable or unfair? The SCA, prior to *Barkhuizen*, consistently held that the answer is 'no'. This it did in *Brisley* and *Afrox*, as well as in *SAFCOL v York Timbers*.[148] The Constitutional Court, especially in *Barkhuizen*, quite clearly said 'yes'. I don't see how else one can understand its core passage, which I quoted above.[149] To be sure, there are important debates to be had about when exactly the reasonableness and fairness enquiries kick in, and how best to apply them when they do. But the fact that *Barkhuizen* licences courts to undertake them surely cannot be denied.

Accordingly, Froneman J, who is much more clear-sighted on these issues than Theron J, says politely that her judgment, by presenting *Barkhuizen* as consistent with *Brisley* and *Afrox*, 'may be read to underplay what *Barkhuizen* actually decided'.[150] Quite so. In fact, commentators had concluded that *Barkhuizen* was not only incompatible with the statements of principle in *Brisley* and *Afrox*, but showed their results were wrong: the clauses in both cases, which the SCA held it was powerless to restrain, would not have passed *Barkhuizen*'s fairness test.[151] So Theron J's unqualified statement that in *Barkhuizen* the Constitutional Court 'affirmed the position of the SCA in *Brisley*',[152] which is a key plank on which to rest her later conclusion that the difference between the two courts is non-existent, is particularly surprising. It suggests that the Constitutional Court's approach, as set out in *Barkhuizen*, is consistent even with the SCA case law *prior* to *Barkhuizen*. That is an especially strong claim, which few would endorse. The only person I know who did endorse this claim is Fritz Brand, whom Theron cites.[153] But Brand had a rather special interest in defending the continuing correctness of the judgments in *Brisley*, *Afrox*, and *SAFCOL*, because he wrote them. His view that nothing the Constitutional Court had done in *Barkhuizen* (or in *Botha*) had changed the law, since it had not expressly overruled the SCA precedents, might have seemed rather

[148] Note 42 above.

[149] Notes 38–39 above.

[150] *Beadica CC* (note 2 above) at para 145.

[151] AJ Kerr 'The Defence of Unfair Conduct on the Part of the Plaintiff at the Time Action Is Brought: The Exceptio Doli Generalis and the Replicatio Doli in Modern Law' (2008) 125 *South African Law Journal* 241, 246. Brand had himself suggested, even prior to *Barkhuizen*, that the clause in *Afrox* might be invalidated on the basis of public policy if it had been differently argued: see F Brand and D Brodie 'Good Faith in Contract Law' in R Zimmermann, D Visser and K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 115. Dennis Davis twists the knife, post-*Barkhuizen*, in his 'Developing the Common Law of Contract' (note 139 above) at 852.

[152] *Beadica CC* (note 2 above) at para 38.

[153] Ibid at para 57 fn 135. See also para 17 fn 23 and especially para 31, which lean heavily on Brand's views.

wishful[154] – a glib way to negate what *Barkhuizen* had set out to do. Remarkably, however, it has now been endorsed by the Court whose judgments Brand sought to negate.

How then is Theron J able to sell this image of supposed harmony? The answer is that she trades on confusion, which has at least two related sources. The first is that *Barkhuizen* did indeed cite *Brisley* with approval. But it did so for a much narrower point than the one Theron J comes to base upon it. The second is that the courts have consistently affirmed, throughout the constitutional era, that abstract values are not 'free-standing' or 'free-floating' tests. But this does not show, *pace* Theron J, that the courts' approach has remained constant. It shows that the 'free-standing' metaphor has changed meaning.

1 *The Brisley bugbear*

Barkhuizen, as we have seen, endorsed fairness and reasonableness as the yardsticks by which the validity of a time-bar clause was to be assessed. Even as it did so, however, it held that 'good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law'.[155] For this proposition Ngcobo J cited the judgment in *Brisley*,[156] as well as the writings of Dale Hutchison on which the SCA's approach was itself based.[157]

So *Barkhuizen* was willing to approve the SCA's view that good faith has only a secondary role in South African law. The question is what we should take from this. SCA apologists like Fritz Brand have taken from it a strong and surprising conclusion. Brand said it showed that *Barkhuizen* did not purport to change our law.[158] This is because the judgment, through its endorsement of *Brisley*, meant to affirm, so Brand claimed, the SCA's long-established view that abstract values are never directly applicable legal tests. *Barkhuizen* therefore cannot have departed meaningfully from the approach the SCA had laid down thitherto.

But this rests on an interpretive mistake. It reads Ngcobo J's rejection of good faith specifically as a rejection of abstract values *tout court*. But he did not mean to reject all abstract values. He was discussing good faith *in contradistinction* to fairness and reasonableness, meaning to reject a role for the former, without casting any doubt on the application of the other two.[159]

[154] Did Brand himself even take it seriously? Arguably not, since his extra-curial writing quickly accepted that the law would move on from *Afrox*: see again Brand and Brodie (note 151 above) at 115. Moreover, his first discussion of *Barkhuizen* acknowledged that its 'core investigation' is 'whether the enforcement of the time-limitation clause involved would in the circumstances be reasonable and fair': Brand 'Good Faith' (2009) (note 49 above) at 85. He then complicated this, though only slightly, by referring to other passages of *Barkhuizen* that created 'unpredictability' about the correct approach to abstract values: ibid at 86. It was only later that (as I discuss below) he began to attach undue weight to those passages, as well as to the fact that the Court did not expressly overrule *Brisley*, *Afrox*, and *SAFCOL*, and thus to profess the conveniently simple view that *Barkhuizen* did not require any updating of the views he had expressed in that trilogy of cases.

[155] *Barkhuizen CC* (note 34 above) at para 82.

[156] Ibid fn 58. The citation given is to para 32 of *Brisley*, but this must be a mistake, since that paragraph says nothing of relevance. The intention must have been to refer to para 22, which is cited correctly in fn 59.

[157] See again note 42 above.

[158] One can chart Brand's deployment of this idea through Brand (note 49) at 86; *Maphango* (note 52 above) at para 24; *Potgieter* (note 52 above) at para 33; Brand (note 54 above) at 240, the last two of which Theron J cites.

[159] As Froneman J puts it, *Barkhuizen* is 'direct authoritative precedent' that, in at least some circumstances, 'fairness, reasonableness and simple justice between persons are the unmediated standards against which the validity of the clauses or their enforcement is judged. *It is only in relation to good faith* that the Court referred to the then existing state of affairs that it is not a "self-standing rule".' See *Beadica CC* (note 2 above) at para 151 (emphasis added).

That should have been obvious, given that his judgment's core passages instated fairness and reasonableness as directly applicable legal tests. Ngcobo J was, at the point he cites *Brisley*, addressing a quite different argument – this one raised by the respondent insurer, rather than by Mr Barkhuizen.[160] This argument did not cast any doubt on the fact that fairness and reasonableness were the appropriate yardsticks by which to assess public policy, which Ngcobo J, to repeat, had by this point already clearly accepted.[161] Rather, the insurer's argument was that it was under a general duty of good faith in its performance of the parties' contract, which entailed a duty not to assert the time-bar clause unjustly; hence it was unnecessary to invalidate the clause in the name of fairness, since fairness could be ensured in this other way.[162] Ngcobo J replied that there was no need to take a position on this defence, since Mr Barkhuizen's claim was bound to fail regardless of it: even assuming the insurer's defence failed, Mr Barkhuizen's claim would fall into an evidentiary hole, since he had provided no explanation of why he had failed to comply with the time-bar.[163]

In sum, Ngcobo J's citation of *Brisley* stands only for what it says: that *good faith* is not a self-standing rule. It does not cast doubt on the fact that reasonableness and fairness are. And indeed Ngcobo J was willing to grant the point about good faith only *arguendo*,[164] since it made no difference to his application of the fairness test he had by this point authoritatively established. He said that *Brisley* reflected the law 'as [it] currently stands', and hinted that the position may change under the influence of the Constitution.[165] He declined to take that step in *Barkhuizen*, however, where the issue had been raised only as 'an after-thought'[166] and in any event did not matter.

This feature of *Barkhuizen* is not ambiguous or difficult to interpret. The problem has arisen only because the judges of the SCA had taken a different view from Ngcobo J about what *Brisley* signifies, and projected their own views onto *Barkhuizen*. The SCA had said that good faith is not a directly applicable test, *and the same is true* of reasonableness and fairness. They are all of them 'abstract values', which are unsatisfactory as legal tests. Hence, they are afflicted by a shared vice, and must be rejected for that shared reason. That is why the SCA thought it natural to widen the antipathy from good faith itself to encompass *all* 'abstract

[160] This is indicated in *Barkhuizen CC* (note 34 above) at paras 79–80. See also para 21.

[161] Ngcobo J had instated (and many times repeated) his fairness test between paras 50 and 73. It is only thereafter that he turns to the insurer's 'defences' based upon the maxim *lex non cogit ad impossibilia* (paras 75–78) and good faith (paras 79–81), and then says that he refuses to entertain either of them (para 82). That this part of Ngcobo J's judgment is severable from its establishment of a fairness test is made even clearer by the judgments of his colleagues. O'Regan J wrote separately to say that, although she concurred in the passages in which Ngcobo J set out his fairness test, she reserved her position on the issue of good faith (para 120). Moseneke DCJ, still more clearly, said that the insurer's argument based upon good faith was 'belated' and 'of no practical value' (para 119).

[162] Particularly at para 79; and also Moseneke DCJ's account of it at paras 118–119.

[163] Especially at para 83: 'In the view I take of the facts', Ngcobo J said, 'it is not necessary to reach any firm conclusion.' See also Moseneke DCJ's account of Ngcobo J's conclusion at para 118.

[164] It is clear, as explained, that O'Regan J and Moseneke DCJ thought even this was incautious. Moreover, it is arguable that the Court has, in more recent cases, endorsed for good faith a more robust role: see especially *Everfresh* (note 58 above) at para 72. If it has, that would furnish a further objection to Theron J's reliance on this part of *Barkhuizen*. But I do not pursue that point here.

[165] *Barkhuizen CC* (note 34 above) at para 82.

[166] This is Moseneke DCJ's description: para 119.

ideas', of which 'good faith, reasonableness, fairness and justice' were mere examples.[167] And the SCA later convinced itself, or sought to convince others, that Ngcobo J (since he, too, had rejected good faith, citing *Brisley*) shared its general view. In truth, however, that view played no part in Ngcobo J's willingness to cite *Brisley*, and plainly he did not share it. Conspicuously absent from *Barkhuizen* is any antipathy to abstract values in general (or any citation of *Afrox*'s expression of it).[168] To the contrary, *Barkhuizen* is replete with their invocation – and it instates two abstract values, reasonableness and fairness, as directly applicable within its hallmark test.

So *Afrox* and *Barkhuizen* built two quite different claims atop *Brisley*. They are not in dialogue, despite their shared source, and on the key point they diverge. The two approaches give two different answers to the most basic question of all, namely whether fairness and reasonableness are directly applicable tests. *Afrox* says 'no', and *Barkhuizen* says 'yes', and never the twain shall meet – no matter how much one pretends they do.

2 *A free-floating metaphor*

The second source of confusion – through which Theron J's judgment contrives the illusion of harmony, but not its actuality – is still more fecund. It is the vagueness and opacity inherent in the hackneyed claim, which I have already quoted, that reasonableness, fairness, and good faith are not 'free-floating', 'free-standing', or 'self-standing' rules or tests. This uses a metaphor to describe our law's approach to these values, and one which has been invoked in almost every judgment from *Brisley* to *Beadica*.

There is nothing wrong with using a metaphor as a supplement to legal analysis. But there is a great deal wrong with using it as a substitute. And when a metaphor is cut adrift from its context, carried through twenty years of case law from opposing courts addressing different issues and applying it to different objects, and then held up as a statement of law that captures the essence of the whole topic, the death of analytical clarity is close at hand. In *Beadica*, Theron J uses the fact that both the SCA and Constitutional Court have consistently endorsed this metaphor to generate the powerful conclusion that the two courts' approaches align. But they do not align. The metaphor has been a constant in our jurisprudence only because it can mean so many different things.

Here are the three pertinent things it might mean to say that fairness and reasonableness are not 'free-standing' (or 'free-floating', or 'self-standing'):

1. **No application (except indirectly).** A court's assessment of the fairness or reasonableness of a particular contract term (or its enforcement in a particular dispute) is never a ground for invalidating it. (However, a court may develop doctrines that are fair and reasonable, and the application of those doctrines to a particular contract term (or dispute) may have important legal consequences.)
2. **Conditional application.** A court's assessment of the fairness or reasonableness of a particular contract term (or its enforcement in a particular dispute) is a ground for invalidating it, but only if certain prior requirements are satisfied.

[167] *Afrox* (note 42 above) at para 32 (my translation). See also *SAFCOL* (note 42 above) at para 27. To be sure, *Brisley* itself mentioned reasonableness (*redelikheid*) and fairness (*billikheid*) several times. Crucially, however, these are not mentioned in the passage Ngcobo J cites (nor in the work of Hutchison quoted there).

[168] *Afrox* is, however, cited for other points: see *Barkhuizen CC* (note 34 above) at para 28 fn 11; para 59.

3. **Authorised application.** A court's assessment of the fairness or reasonableness of a particular contract term (or its enforcement in a particular dispute) is a ground for invalidating it, but only if there is a legal doctrine that makes it so.

These three propositions are not meant to cater for all the parameters that are relevant in determining the role of fairness and reasonableness. For example, there is an important question, which I am suspending for the moment,[169] about the *degree* of unfairness or unreasonableness (supposing these are indeed the applicable criteria) that is necessary to justify the court's intervention. How high, in other words, is the threshold set? But we can separate that question from the prior one I am tackling here: namely, in what circumstances (if any) are the fairness and reasonableness of a contract term (or its enforcement) legally relevant?

The first proposition is by far the most rigid. It says that fairness and reasonableness are *never* directly applicable to a particular contract term or dispute. It is the proposition that emerged in the SCA jurisprudence prior to *Barkhuizen*, and most clearly in *Afrox* and *SAFCOL*. There Brand JA held, based on *Brisley*, that 'abstract ideas like good faith, fairness, reasonableness, and justice … do not create an independent or "free-floating" basis for the invalidation or non-enforcement of contractual provisions', which he understood to mean that these values 'are not themselves legal rules', and that, '[w]hen it comes to the enforcement of contract terms, the court has no discretion and does not act on the basis of abstract ideas'.[170] Put differently, 'contractual stipulations cannot be avoided on the basis of abstract notions such as fairness and good faith'; these 'do not constitute independent substantive rules that courts can employ to intervene in contractual relationships' and 'cannot be acted upon by the courts directly'.[171] Their influence 'is merely of an indirect nature': they are values that underlie the 'crystallised legal rules' – but it is these, not the values themselves, that the court must apply.[172] Otherwise, the court would be substituting legality with its own discretion, in defiance of the rule of law.[173]

The second proposition is the intermediate one defended by Harms DP in *Bredenkamp*.[174] He concedes, in light of *Barkhuizen*, that a court may sometimes assess a contract term or its enforcement for fairness and reasonableness. But he says it may do so only if a prior test has been met. That prior test, according to Harms DP's interpretation of *Barkhuizen*, is that the term (or its enforcement) infringes a constitutional right of the complainant, or implicates some other constitutional value.[175]

[169] I return to it in part IIE3 below.

[170] *Afrox* (note 42 above) at para 32 (my translation). The paragraph in its original Afrikaans reads: 'Aangaande die plek en rol van abstrakte idees soos goeie trou, redelikheid, billikheid en geregtigheid het die meerderheid in die *Brisley*saak beslis dat, ofskoon hierdie oorwegings onderliggend is tot ons kontraktereg, dit nie 'n onafhanklike, oftewel 'n "free floating" grondslag vir die tersydestelling of die nieafdwinging van kontraktuele bepalings daarstel nie; anders gestel, alhoewel hierdie abstrakte oorwegings die grondslag en bestaansreg van regsreëls verteenwoordig en ook tot die vorming en die verandering van regsreëls kan lei, hulle op sigself geen regsreëls is nie. Wanneer dit by die afdwinging van kontraksbepalings kom, het die Hof geen diskresie en handel hy nie op die basis van abstrakte idees nie, maar juis op die basis van uitgekristaliseerde en neergelegde regsreëls.'

[171] *SAFCOL* (note 42 above) at paras 27, 31.

[172] *Afrox* (note 42 above) at para 32 (my translation). See too Hutchison 'Good Faith' (note 42 above) at 230–231, quoted in *Brisley* (note 42 above) at para 70 (Olivier JA).

[173] *Brisley* (note 42 above) at para 24.

[174] *Bredenkamp* (note 18 above). See the first containment strategy discussed at notes 48–50 above.

[175] Ibid at paras 41–53. The constitutional right at issue in *Barkhuizen* itself, Harms DP points out, was the right of access to court. Harms DP held that Mr Bredenkamp's case failed because the closing of his bank account

To endorse this second proposition is to abandon the first. This is because the second proposition concedes – as, after *Barkhuizen*, it must – that fairness and reasonableness *are* sometimes directly applicable. In substance, Harms DP acknowledges this change, and rightly so. He never says or suggests that *Barkhuizen* achieved nothing, in the way that Brand did. Rather, he gives a detailed account of the key test, fleshes it out with some instances where it would justify judicial intervention, and states that the court must (sometimes) assess the fairness and reasonableness of the term or its enforcement.[176] Nor does he suggest that *Afrox* should still be treated as authoritative.[177] So far, so good. There is an important difference between *Afrox* and *Bredenkamp*, which Harms DP does not deny.

Yet he obscured this difference by describing the new proposition in the same language as the old one from which he was departing. He summed up his conclusion in *Bredenkamp* by saying that 'fairness is not a free-standing requirement for the exercise of a contractual right'.[178] This is, of course, the metaphor that had been popularised in *Brisley* and *Afrox*. But Harms DP was using it to express a conclusion that shows those judgments to be wrong, since he grants, under pressure from *Barkhuizen*, that fairness *is* sometimes directly applicable. The metaphor remained useful to Harms DP, I suppose, because it captured the idea that the fairness test was coupled to a prior condition; fairness was, in *that* sense, not 'free-standing'. That is clearly a different idea to the one expressed in the first proposition. But Harms DP's use of the same metaphor to express it might, if taken out of context, give the spurious impression of continuity. Unfortunately that spurious impression was presented as truth by Fritz Brand, who had, as I said, a peculiar interest in eliding the change that had occurred between *Afrox* and *Barkhuizen*. Harms DP's repetition of *Brisley* and *Afrox*'s metaphor helped him to do it.[179] And Brand's views found their way into Cachalia JA's principle (vi),[180] which reprises the old meaning of the metaphor despite *Barkhuizen*.[181] Lewis JA then repeats both Cachalia JA's principle, and uses them to underscore the metaphor, in her judgment in *Beadica*.[182]

Froneman J is, again, clear-sighted about these machinations. He specifically points out that the 'free-standing' metaphor had acquired a second meaning in *Bredenkamp*.[183] And he chastises the SCA judges who took advantage of the confusion to reprise the first. Although *Bredenkamp* 'did not purport to contradict *Barkhuizen*'s general import', he says, SCA judgments following it 'uncritically adopted the mantra that "abstract values of fairness and reasonableness" may not directly be relied upon by the courts'.[184] They thus reprised *Brisley* and *Afrox*'s first reading, even though it is inconsistent with *Barkhuizen* and indeed *Bredenkamp*.[185] Lest there be any

– even if it were unfair – infringed no constitutional right (or, at any rate, Mr Bredenkamp had failed to explain why it did): see paras 30, 60.

[176] Ibid at paras 47–48.

[177] *Afrox* is nowhere cited. *Brisley* and *SAFCOL* are cited only passingly.

[178] *Bredenkamp* (note 18 above) at para 53.

[179] *Maphango* (note 52 above) at para 23, where Brand JA uses Harms DP's endorsement of the free-standing metaphor as his entrée to justify repeating, as good law even after *Barkhuizen*, his own judgments in *Brisley* and *SAFCOL*. And he repeats all of this, almost verbatim, in *Potgieter* (note 52 above) at paras 32–34.

[180] He takes this principle from *Potgieter* (note 52 above) at paras 32–34. See *Pridwin SCA* (note 20 above) at para 27 fn 12.

[181] See also *Pridwin SCA* (note 20 above) at para 76.

[182] *Beadica SCA* (note 12 above) at paras 34–35.

[183] *Beadica CC* (note 2 above) at para 155.

[184] Ibid at paras 155–156.

[185] Ibid at paras 156–158.

confusion about the point, Froneman J singles out for criticism Cachalia JA's principle (vi), and Lewis JA's endorsement of it.[186] Despite all this, however, Theron J merrily endorses what those judges said, and uses the persistence of the 'free-standing' metaphor as her main piece of evidence that *Afrox*, *Barkhuizen*, and *Bredenkamp* all agree.

Indeed Theron J stretches the metaphor still further – which brings me to the third meaning I mentioned. According to it, fairness and reasonableness are not 'free-standing' in the sense that they may not be applied as legal tests unless there is a legal rule authorising their being so used. This proposition is by far the weakest. Like the second proposition, it accepts that fairness and reasonableness may be applied directly. Unlike the second proposition, however, which imposes a meaningful restriction on when those tests may be applied, the third proposition does not. It says a court may apply a fairness or reasonableness test provided only that it is licenced to do so by some legal doctrine. Arguably that requirement is satisfied trivially, *whenever* a court may apply a fairness or reasonableness test – for to say that a court may, legally speaking, apply that test seems inevitably to entail that some rule of law empowers it to do so. Certainly, the proposition is satisfied very easily. It is satisfied provided only that the fairness or reasonableness test is conceived of as taking place under some doctrinal heading – such as, pertinently, the longstanding rule that a contract term (or its enforcement) is invalid if it is contrary to public policy.

The punchline is that Theron J in *Beadica* seems, in the end, to understand the requirement that the fairness test not be free-standing only in this minimal sense. Here is the passage in which her lengthy discussion of our courts' jurisprudence culminates:

> [A]bstract values [including fairness and reasonableness] have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law; including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.[187]

So it is this fact – that fairness and reasonableness are channelled through public policy – that Theron J ultimately holds up as showing that the SCA and Constitutional Court agree after all.[188] In truth, however, this third proposition is anodyne in the extreme. It gets us no closer to the much stronger first proposition that the SCA in its early judgments endorsed (and which it continues to endorse, despite *Barkhuizen*), nor even to the more moderate second one endorsed in *Bredenkamp*. To be sure, Theron J had at earlier points in her judgment seemed to endorse both the first and the second readings of the metaphor. But apparently she did so *only because* she thought that the Court had already endorsed these, and that they were equivalent in meaning to each other and to her third reading. Both assumptions are mistaken. The three meanings are not equivalent, and in fact the first is incompatible with the others.

Theron J's third proposition also does nothing to allay the SCA's worries about unfettered judicial discretion, upon which its own endorsement of the metaphor is based. Theron J cites the value of certainty as a justification for her novel proposition,[189] but it is hard to see any connection. The kernel of *Barkhuizen*, as understood in *Beadica*, is that if a term (or its

[186] Ibid. He also criticises principle (v), on comparatively minor grounds, which I briefly consider in part IIIA.

[187] *Beadica CC* (note 2 above) at para 80.

[188] The quotation is meant to explicate her view that 'the divergence between the jurisprudence of this Court and that of the Supreme Court of Appeal is more perceived than real': see again *Beadica CC* (note 2 above) at para 80.

[189] Ibid especially at para 81.

enforcement) is gravely unfair then it will be contrary to public policy, and if it is contrary to public policy then it will be invalid.[190] Theron J's third proposition reminds us that our law interposes the intermediate conclusion: namely, that the term is contrary to public policy. But that intermediate conclusion, though it may allow us to give the fairness test a neat taxonomical home, adds nothing of substance. The public policy doctrine is merely a conduit. It leaves unaltered the fact that the term (or its enforcement) will be invalidated in virtue of the court's assessment of its fairness, which it does nothing to restrain. Hence, as Froneman J points out, the majority judgment's key conclusion has, by its own logic, failed.[191] It does not bear out the normative commitments upon which the SCA's position was based, and which Theron J invokes in support of her own.

Froneman J describes Theron J's deployment of the metaphor as 'innovative',[192] and he is not wrong. Yet the slippage between the first and third propositions may be traceable to Brand JA's early SCA judgments on the topic. This was a result of *Sasfin*. There the Appellate Division, as is well known, invalidated a contract by applying the public policy test, the pivotal aspect of which was said to be the need to do 'simple justice between man and man'.[193] In *Afrox*, Brand JA took *Sasfin* to show that 'a contract term which is so unreasonable that it is inconsistent with public policy is unenforceable'.[194] That seems accurate enough. But it would seem in considerable tension with his bald statements, in the same judgment, and then again in *SAFCOL*, that reasonableness gives courts 'no discretion', 'cannot be acted upon by the courts directly', and cannot be used by courts to intervene in contractual relationships.[195] The breadth of those statements was doubtful, in short, even when Brand JA made them.[196] Certainly they became unsustainable once *Barkhuizen* had gone much further than *Sasfin* and held repeatedly that fairness and reasonableness are the controlling constitutional-era tests. Yet, far from causing Brand JA to moderate his views, *Barkhuizen* seemed to have the opposite effect. As we have seen, he continued, after *Barkhuizen*, to invoke the most unyielding passages of *Brisley*, *Afrox*, and *SAFCOL* – and now without any counterweighing acknowledgment of

[190] Of course, these connections may not be so straightforward if, for example, *Bredenkamp*'s second reading of the metaphor is true, since in that case the term's unfairness results in invalidity only if a constitutional right has (also) been infringed. I dealt with that possibility elsewhere. My point here is that Theron J's endorsement of the third proposition only does not help to instate any such restraints.

[191] *Beadica CC* (note 2 above) at paras 160–161.

[192] Ibid at para 145.

[193] *Sasfin* (note 15 above) at 9G, quoting *Jajbhay v Cassim* 1939 AD 537 at 544.

[194] *Afrox* (note 42 above) at para 8 (my translation). The original Afrikaans is: ''n Kontraksbepaling wat dermate onbillik is dat dit met die openbare belang, in stryd is, is regtens onafdwingbaar.' See also *Brisley v Drotsky* (note 42 above) at para 31.

[195] Notes 170–172 above.

[196] At that stage Brand JA's statements might have been defended, I suppose, on the basis that he was treating the public policy test and the principle of good faith as two quite separate legal mechanisms, and so his seemingly inconsonant statements should be separated on the same basis: he was saying that, even though reasonableness *is* relevant within the public policy test, there is no basis *other than that* for using reasonableness and fairness as grounds for courts to intervene directly and invalidate a contract's terms. (Note the separation of his 'public policy' discussion at paras 8–30 of *Afrox* from the discussion of 'bona fides' at paras 31–32; and also the last line of para 32.) But, if that were all Brand JA meant in confining 'abstract values', it would make it only more strange that he later deployed his remarks in order to interpret *Barkhuizen* – which had instated fairness and reasonableness as the applicable yardsticks *within the public policy test*. If his initial rejection of abstract values is to be made plausible by separating it off from the public policy test, in other words, then his later extension of those remarks into precisely that realm becomes all the more objectionable.

Sasfin. Indeed he suggested that they held the key to interpreting a judgment of a court higher than his own that had, in truth, shown almost no sympathy with his views whatsoever. So it may be said, with some justification, that it was the SCA that introduced, and then much aggravated, the tension between the first and third propositions. And the SCA continues to reproduce it: Cachalia JA's principle (vi), which derives from Brand JA's rejection of 'abstract values', is not consistent with his principles (ii) and (iii), which derive from *Sasfin* and especially from *Barkhuizen*.[197] The former embodies what I have been calling the first reading of the 'free-floating' metaphor; the latter is consistent only with the third reading, or perhaps, if one applies the lens of *Bredenkamp* to it, with the second one.

Even so, what the Constitutional Court has done in *Beadica* comes as a surprise. For it has fulsomely denied that any tension exists, and on that basis endorsed both halves of the disjunction, including the views of Brand JA which defy the Court's own judgments. The 'free-floating' metaphor helps to obscure the tensions, but the veneer is cracked and paper-thin.

E RESULTS

So *Beadica* tries to rewrite history, but history is stubborn. And, in the case of the development of judicial fairness controls in our contract law, it is no fairy tale. There are questions of real import to which our different courts have at different times given different answers. Instead of confronting these, *Beadica* repeats and reifies deep ambiguities, which are not capable of providing the clear guidance Theron J claims to value. Yet *Beadica* will have effects that are real, even if its historical basis is not. In this part I try to make sense of these.

1 *Botha*

First, and most obviously, *Botha v Rich* has been confined. As a result, no court should rely on its precedential force to justify intervening in future – except, of course, in disputes where the purchaser's right under s 27 of the Alienation of Land Act are at stake, and perhaps in analogous cases where the court is trying to give effect, in a contractual context, to a statutory scheme.[198] Its invocation in judgments like *Louw v Davids*,[199] therefore, which took it to stand for a far-reaching proportionality test for the exercise of contractual rights, even absent any relevant statute, must be regarded as mistaken.[200]

Beadica in fact suggests something stronger: it describes the parts of *Botha* in which the Court said cancellation should be restrained on the basis of its proportionality test as '*obiter dicta*'.[201] But that seems wrong. The remedy that the Trust in *Botha* asked for, and which both lower courts ordered, was that the contract be declared cancelled. The Constitutional Court upheld an appeal against that order, and set the cancellation aside, for the reasons it identified in the passage of its judgment to which Theron J refers. This was surely a necessary part, therefore, of the Court's decision. It is true the Court had to decide other issues before it got

[197] One feature of his principle (v) is also suspect, for related reasons that I mention at note 245 below.

[198] Compare Boonzaier (note 100 above) at 10. *Magic Vending* (note 146 above) at para 10 considered the logic of *Botha* to be applicable, in principle, to the Rental Housing Act 50 of 1999.

[199] See again *Louw v Davids* (note 101 above) at para 30.

[200] Naturally these judgments may be defensible on some other basis. In the case of *Louw v Davids*, the SCA in fact noted other bases: see para 22.

[201] *Beadica CC* (note 2 above) at paras 55–56.

there. But its holding that cancellation ought to be restrained in the name of proportionality and fairness was the final crucial link in the chain.[202]

The correct view thus seems to be that *Botha* does establish, as *ratio*, that a disproportionate effect on the seller is a powerful reason to hold that the enforcement of a contract term would be unfair; but that the question of fairness arises only if a prior condition is satisfied. The condition was satisfied in *Botha* because of the statutory scheme, to which proper effect would not be given if the Trust's enforcement of the contract were left unrestrained.

2 *Bredenkamp*

That then means attention can return to the proper effect of *Barkhuizen*, unclouded by the controversial way it was pressed into service by *Botha*. *Beadica* indeed emphasises that *Botha* 'did not revisit or revise the *Barkhuizen* test', which 'remains the leading authority in our law' on fairness in contract and the public policy test.[203]

One important question is whether *Bredenkamp*'s interpretation of *Barkhuizen* is correct. Prior to *Beadica*, the Court had not considered *Bredenkamp*'s interpretation at all. In *Beadica* both the majority and minority judgments consider it. The problem I posed in part IID was that, although the majority endorsed the view in *Bredenkamp*, it did so only after equating it, mistakenly, with views that are distinct. Despite this flaw in the supporting reasoning, however, it seems we should now regard *Bredenkamp* as officially confirmed. The text of both judgments supports this.[204] Theron J's endorses it via her approving quotation of Cachalia JA's principles (ii) and (iii),[205] which were based upon it; and other passages of her judgment adopt its core holding implicitly.[206] Froneman J, who considers the correctness of *Bredenkamp* more squarely, reaches the express conclusion that it is correct, indeed unexceptional.[207] So it seems that *Bredenkamp*, which was given 'almost disrespectful' treatment in *Botha*,[208] has now been conclusively affirmed.

But perhaps the real question is: what does *Bredenkamp* stand for, and how will it be applied? For here there are – inevitably – tensions in the case law, and, depending on how they are settled, *Bredenkamp* may have vastly different implications.

To be more precise: what is the condition upon which *Barkhuizen*'s fairness test is now conditional? On the very first account of *Bredenkamp* that I gave,[209] it was offering an

[202] See also Boonzaier (note 100 above) at 10 (arguing that the issue of cancellation cannot be separated from those that came before).

[203] *Beadica CC* (note 2 above) at para 58.

[204] It would also mesh well with *Beadica*'s narrowing of *Botha*. If it were really true that *Barkhuizen* unconditionally subjects all contract terms (and their enforcement) to a fairness test, it is hard to see why there was any need to narrow *Botha*. *Botha* would have been merely spelling out what was immanent in *Barkhuizen*. But if *Barkhuizen* in truth subjects terms and their enforcement to a fairness test only conditionally – i.e. only if the Constitution is implicated – then we can understand the sense in which the rejected interpretations of *Botha* were indeed too expansive: they did not recognise the condition.

[205] *Beadica CC* (note 2 above) at para 82.

[206] Her initial account of *Bredenkamp* raises no objection to it: ibid at paras 40–42. Indeed she points out how consistently it has been affirmed by the SCA. See also para 87, which I discuss at note 216 below.

[207] Ibid at paras 153–154.

[208] Hutchison 'From Bona Fides to Ubuntu' (note 23 above) at 119.

[209] See part IB above.

interpretation of *Barkhuizen* that was deliberately moderate.[210] By saying that the fairness test is engaged only when the term (or its enforcement) infringes a constitutional right, it imposes a meaningful precondition for the fairness test's operation, and one which may be desirable, since it restrains the judicial discretion that had troubled the SCA.[211] First, the term (or its enforcement) is subjected to a fairness test only in a subset of cases, not all of them. Second, the establishment of the prior condition is less discretionary and open-ended than the fairness test itself, since the question of whether a certain right has been infringed is an enquiry structured by the constitutional text and much case law. Hence the two steps, taken together, produce some determinacy that the fairness test alone does not. And, although I'm sure Harms DP's reading was motivated in part by his view that it was a desirable one, it seems faithful to *Barkhuizen*.[212] After all, the Court there found that Mr Barkhuizen's constitutional right of access to court was infringed, and developed its fairness test only thereafter, as a means of deciding whether the infringement sufficed to make the clause (or its enforcement) contrary to public policy.

It cannot be denied, however, that Harms DP *said* something wider: he said that the relevant question is whether constitutional 'values' are implicated – not confining himself to the infringement of 'rights'.[213] That is the wording on which Froneman J seizes in *Beadica*, expressly rejecting the interpretation of *Bredenkamp* that I have just outlined.[214] *Bredenkamp*, he says, does not require an infringement of rights; the fairness test kicks in provided only that the contractual term is 'in conflict with constitutional values or other public policy considerations'.[215] Theron J does not discuss the issue at the same length, but she endorses Froneman J's view. In a passage in which she speaks of the 'constitutional rights *and* values' that inform public policy,[216] she adds (in a footnote presumably designed to head off any disagreement with Froneman J): 'This is not to say that a constitutional right must be implicated for a contractual term to be contrary to public policy.'[217] So she evidently agrees that *Bredenkamp* is not as constrained as some thought.

But if merely identifying an implicated constitutional value is sufficient to trigger the fairness enquiry, then Harms DP's precondition is made vapid, or at least potentially so. For the Court has shown a willingness to link almost any dispute before it to constitutional values – including to fairness itself.[218] And it merely needs one or two off-handed sentences in which to do it. If Harms DP's use of the word 'values' is exploited in this way, it would undermine what his judgment in *Bredenkamp* was trying to do, namely to interpose a meaningful precondition

[210] In some ways, Harms DP was surprisingly willing to give *Barkhuizen* a wide scope. For example, he might have understood the judgment – not without plausibility – to apply only to time-bar clauses, or only to terms that implicate the right of access to court. (Though if this were so, then naturally there would be a need for similar controls to be developed for other terms in future cases.) Yet he did not limit it in this way, instead assuming that the fairness test applied across contract law generally. He settled only for the limitation that I discuss in the text.

[211] Compare *Bredenkamp* (note 18 above) at paras 39–40.

[212] But see, for a forcefully expressed alternative view, J Barnard-Naudé 'Deconstruction Is What Happens' (2011) 22 *Stellenbosch Law Review* 160.

[213] See *Bredenkamp* (note 18 above) at paras 46–48.

[214] See again *Beadica CC* (note 2 above) at paras 153–154.

[215] Ibid at para 154.

[216] Ibid at para 87.

[217] Ibid at para 87 fn 200.

[218] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* [2009] ZACC 6, 2009 (4) SA 529 (CC) at para 221.

before the fairness enquiry is activated.[219] Moreover, there is a ready explanation for why Harms DP used the language that he did. He was constrained to use it, because Ngcobo J had used it in *Barkhuizen*; and Ngcobo J was constrained to use it in *Barkhuizen* because the Constitution uses it in section 39(2).[220] Ngcobo J had decided (for reasons unrelated to anything said so far) that his power to develop the public policy test was sourced in this section, which bases itself upon constitutional values – and not in section 8, which speaks of 'rights'.[221] And so he felt he could not avoid honouring section 39(2)'s language – even though in substance his reasoning was clearly that Mr Barkhuizen's constitutional right was infringed, and not (merely) that constitutional values were implicated.[222] It is strongly arguable that Ngcobo J's premise was mistaken: in truth, he was fully entitled to develop his public policy test under s 8.[223] More importantly, the truth (or falsity) of that premise is entirely irrelevant to the question of how the public policy test ought to be designed. So it is unfortunate that this incidental fact seems to have determined the precedential effect of *Bredenkamp* in a way its rationale arguably does not support. More unfortunate still is the fact that the Court offers essentially no reasoning to justify this aspect of its decision.[224] Nor does it explain what sorts of 'values' are sufficient to engage public policy in this context – although that would seem now to be the pivotal issue.

3 *The lower courts and a higher bar*

The result is that *Botha* has been narrowed, which is valuable, but otherwise *Beadica* establishes few principles of significance. It does decide, almost by accident, that *Bredenkamp* is correct – but it understands that judgment in a way that may subvert its main message. At any rate, the law as so understood leaves two very wide questions in the hands of lower courts. What sorts of values or considerations bear on public policy in this context? And, once considerations of that kind are implicated, thus activating the fairness test, what does it take to satisfy it?

The future of *Barkhuizen* seems therefore to depend almost entirely on the attitude of the courts applying it. In the case of the SCA, that attitude could hardly be clearer. The

[219] To be fair, the SCA had many times quoted Harms DP's inclusion of 'values', including in Cachalia JA's principle (ii). In application, however, it took a robust line about what counted as a relevant value, denying almost invariably that any was implicated.

[220] Strictly speaking, it refers to the 'spirit, purport, and objects' of the Constitution. But this cumbersome phrase is customarily substituted, of course, with 'values'.

[221] Ngcobo J thought there was no 'law of general application' at issue in the case, which meant s 36 of the Constitution was inapplicable; and since s 36 is linked to s 8 (by ss (3)(b)) he thought the latter was thus also inapplicable: see *Barkhuizen CC* (note 34 above) at para 23.

[222] Ngcobo J is thus drawn into strange locutions, such as that he is considering the 'values that underlie our constitutional democracy, *as given expression to* in s 34' – i.e. in the particular right of Mr Barkhuizen that he said was infringed: ibid at para 36 (emphasis added). Harms DP, evidently noticing the significance of this, draws attention to it in *Bredenkamp* (note 18 above) at para 43.

[223] See note 327 below.

[224] The majority simply falls into line with Froneman J, who does not say why he thinks this is the best understanding of *Barkhuizen*. But if I may venture a hypothesis, it is that Froneman J feared that if *Barkhuizen* is 'read down' then our contract law will not be developed as progressively as it might otherwise be: courts will be empowered to intervene in fewer cases. But this seems to me to rest on a mistaken presupposition. It is undoubtedly true that *Barkhuizen* itself would be narrower if *Bredenkamp*'s interpretation of it were favoured. But why does everything need to be staked on *Barkhuizen*? Other principles can be developed, and should be developed, to ensure fairness in circumstances where *Barkhuizen* itself does not. In fact it is far better to develop a suite of principles, each targeted at a particular problem, rather than trying to stretch a single principle to cover all of contract law.

overwhelming likelihood is that they will continue to say, as they have said almost invariably up to now, that they can perceive no relevant policy considerations, nor any unfairness, that might justify intervening. And, although the burden of part IID was to show that *Beadica*'s approval of the SCA jurisprudence rests on a series mistakes, the fact is that the Constitutional Court has now given its approval – which the SCA may use to legitimate its proceeding as before. Indeed the SCA has already done both of these things. Its most recent judgment applying *Barkhuizen* holds that – since *Beadica* affirmed Cachalia JA's principles from *Pridwin*, and moreover urged fidelity to *pacta sunt servanda* – there was no basis for it to intervene.[225]

The likely approach of the various High Courts is, inevitably, harder to characterise.[226] Few judges have been as enthusiastic about applying *Barkhuizen* as Davis J – who has now retired – but others may be willing to continue the fight. It is plain, however, that their opponents have been given a boost: those judges who are reluctant to intervene may now, like the SCA, extract from *Beadica* various passages to fortify their views. One passage that has already found favour is this one, which derives from *Brisley* and *Afrox*:[227]

> It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.[228]

Though this passage seems to grant that the term (or its enforcement) is invalidated in virtue of the court's assessment of its unfairness or unreasonableness, the modifier ('so') draws attention to the fact that the unfairness needs to be extreme. This brings to mind the passages of *Barkhuizen* in which Ngcobo J seemed to suggest that the unfairness or unreasonableness must be 'manifest' in order to justify intervention,[229] which some commentators found encouraging.[230] This reading was never consummated, however – as *Botha* shows with particular clarity[231] – and it may be debated how much weight Theron J was attaching to her phrasing here. But she did take care to emphasise that courts must use their powers under the public policy test with 'perceptive restraint',[232] which comes to much the same thing.

Just what it takes for a term (or its enforcement) to be 'manifestly' unfair, or 'so' unfair that it engages public policy, however, or just how much restraint is required of judges given their counterweighing duty to invalidate 'contracts that undermine the very goals that our Constitution is designed to achieve',[233] are questions not easily answered. And other judges may, of course, extract quite different, pro-fairness passages from the mêlée. It will all depend, as ever in this field, on the particular judge.

[225] *Beadica 231 CC v Sale's Hire CC* [2020] ZASCA 76 especially at paras 44–45. As it happens, this judgment is a result of other litigation brought by Beadica against Mr Sale. See further text at note 280 below.

[226] For a brief survey of the diverse attitudes of the High Courts (before the Constitutional Court decision in *Beadica*) see Hutchison 'From Bona Fides to Ubuntu' (note 23 above) at 121–123.

[227] Note 194 above.

[228] *Beadica CC* (note 2 above) at para 80, cited in *Magic Vending* (note 146) at para 8.

[229] *Barkhuizen CC* (note 34 above) at paras 60, 63, 67.

[230] PJ Sutherland, 'Ensuring Contractual Fairness in Consumer Contracts after Barkhuizen v Napier – Part 2' (2009) 20 *Stellenbosch Law Review* 50, 57.

[231] But see the continued use of this phrasing in, for example, *Mohamed's Leisure* (note 20 above) at para 21.

[232] *Beadica CC* (note 2 above) at paras 88–89.

[233] Ibid at para 90.

III THE FACTS

There is good reason to doubt the usefulness, then, of Theron J's grand claims that she has brought clarity to this area. We could do with less pontificating, and more praxis. But it is true that her judgment, when it finally turns to the dispute before her, does contain some pointed holdings of practical import. Both stem from Beadica's averment, which had received much attention in both lower courts, that its owners 'were not sophisticated business people' versed in contract law niceties. For Davis J in the High Court, this was a powerful point in their favour.[234] For Lewis JA in the SCA, it was anything but. She doubted its factual truth,[235] and in any event rejected its legal relevance in the absence of an explanation why Beadica had failed to comply with the notice period.[236] In the Constitutional Court, Theron J comes down firmly on Lewis JA's side. As she does so, two features of her reasoning stand out.

A Claimant characteristics

The first is that she gives very short shrift to Beadica's argument that BEE businesses should not lightly be allowed to fail. We saw earlier that she rejected this argument on economistic grounds, namely that it would deter other parties from contracting with BEE businesses.[237] This is not exactly a *cri de coeur* for non-racialism. Nevertheless, we should recognise the significance of the Court's refusal to countenance the thought that Beadica's vulnerable black-owned status entitled it to special treatment. Beadica's counsel seemed to think this would be a winning argument,[238] and it received the strong endorsement of Victor AJ in dissent.[239] But on the facts of *Beadica*, at least, the majority had no appetite for it.

The broader issue here is the extent to which a court may, in making its fairness assessment, consider the particularities of the parties before it. It is in the nature of *Barkhuizen*'s so-called 'second leg' that the court must consider at least some of these: the court is to ask itself whether, even though the term is fair on its face, its enforcement in the particular circumstances is unfair.[240] This creates certain worries. Perhaps the main point of Moseneke DCJ's dissent in *Barkhuizen* was to reject any suggestion that the complainant's 'personal attributes and station in life' might bear on whether the clause ought to be enforced against him.[241] The context was that Mr Barkhuizen, since his complaint related to insurance he had taken out over his new BMW 328i, was presumably not a poor or illiterate person – which, it had been suggested, should count against his pleas for judicial aid. This Moseneke DCJ rejected, saying that there should be an 'objective assessment of the terms of [the] bargain', which should not be shirked because of the complainant's personal characteristics.[242] Or, as Sachs J put it, 'The rich too have rights'.[243] *Beadica* may be said to confirm that there are limits to the Court's willingness

[234] *Beadica HC* (note 4 above) at paras 37–38.
[235] *Beadica SCA* (note 12 above) at para 39.
[236] Ibid at paras 41, 44.
[237] Note 135 above.
[238] It seems to have been Beadica's main argument on appeal: see applicant's written submissions especially at paras 130–137, available at https://collections.concourt.org.za/bitstream/handle/20.500.12144/36616/Applicants%27 Heads of Argument.pdf?sequence=16&isAllowed=y.
[239] *Beadica CC* (note 2 above) at paras 221–228.
[240] *Barkhuizen CC* (note 34 above) at paras 58, 69.
[241] Ibid at paras 94–104.
[242] Ibid at para 96.
[243] Ibid at para 149.

to consider the particularities of the complainant – now in the opposite kind of case from *Barkhuizen*, in which the complainant claims a special vulnerability.

If that is right, some fine distinctions need to be drawn. One must distinguish the complainant's attributes and social status, which are not relevant, from the impacts of the term upon him, which are.[244] This helps to show, incidentally, why Cachalia JA's principle (v) is wrong insofar as it suggests that only 'harm to the public' is to be considered under the *Barkhuizen* test.[245] It is clear that public policy does take account of the harm 'to the individual contracting party', as Froneman J explained, and Theron J agreed[246] – the only respect in which she departed from Cachalia JA's principles.[247] Second, one must distinguish – probably with difficulty – the parties' respective attributes and status from their relative bargaining power, since the latter is a weighty factor in the fairness test.[248]

There is some play in the joints here, and it is hard to say whether the Court's holding in *Beadica* will prove robust. Perhaps its rejection of the argument based on Beadica's BEE status was helped by the fact that Beadica's complaints of unfairness were in any event unconvincing.

B Evidence of non-compliance

That brings us to the second point to emerge from this part of Theron J's judgment. She makes clear that a court should not entertain a contractual fairness claim that the applicant has not properly evidenced. In particular, unless the applicant explains the reason for failing to comply with the clause it is seeking to invalidate, it ought to lose:

> A party who seeks to avoid the enforcement of a contractual term is required to demonstrate good reason for failing to comply with the term. ... The absence of any explanation for the failure to comply will, in most cases, be the end of the enquiry. [249]

At this point, the demise of Beadica's case is imminent. All that Beadica had alleged, Theron J points out, is that its owners 'were not sophisticated business people and not fully apprised of their rights and obligations regarding their options to renew the leases'.[250] But this is not good enough: Theron J points out that they were the operators of franchises, with previous managerial experience;[251] and that in any event the renewal clauses were 'in simple, uncomplicated language, which an ordinary person could reasonably be expected to understand'.[252] Hence Beadica's profession of ignorance did not go far enough, and the Court was driven to the inference that 'the applicants simply neglected to comply with the clauses in

[244] Passages of *Barkhuizen* treat party-specific impacts as highly relevant to its 'second leg': see para 69 (Ngcobo J); cf. para 104 (Moseneke DCJ); and for discussion Sutherland (note 230 above) at 57–59. And see now *Botha* (note 6 above) at para 51: 'The fairness of awarding cancellation is self-evidently linked to the consequences of doing so'.

[245] The phrase comes from an English judgment quoted in *Sasfin* (note 15 above) at 9. But the Appellate Division did not attach any significance to that particular phrase, and indeed the reason it intervened in *Sasfin* seems inconsistent with it.

[246] *Beadica CC* (note 2 above) at paras 90, 158.

[247] Though she adds her own glosses on two other issues (at paras 83–90), these are consistent with what Cachalia JA had said.

[248] *Afrox* (note 42 above) at para 12; *Barkhuizen CC* (note 34 above) at para 59.

[249] *Beadica CC* (note 2 above) at paras 91–92.

[250] Ibid at para 93.

[251] Ibid. Here Theron J is approving Lewis JA's reasoning in *Beadica SCA* (note 12 above) at para 39.

[252] *Beadica CC* (note 2 above) at para 94.

circumstances where they could have complied'.[253] That meant they had to lose, since public policy does not require the Court to rescue parties from their own, easily avoidable failings.

Theron J's statement that the applicant can succeed only if they explain their non-compliance with the impugned term might seem innocuous, indeed inevitable. After all, it is a general rule of civil litigation that the applicant must prove its case. And *Barkhuizen* expressly confirmed, moreover, that the party seeking to have a term (or its enforcement) declared invalid bears the onus of establishing the unfairness – in particular by 'show[ing] that, in the circumstances of the case, there was a good reason why there was a failure to comply'.[254] The SCA has affirmed this principle many times, including in Cachalia JA's principle (iv).[255] In *Beadica*, Theron J was merely repeating it.[256]

Her doing so is nevertheless significant. For this principle was, again, not honoured in *Botha*. The Court there found for Ms Botha even though (as far as one can tell from the judgment) she provided no explanation of why she had failed, for several months, to make her instalment payments[257] – a fact which the respondents foregrounded as a point telling decisively against her.[258] What's more, the Court at the moment of crucial decisional relevance imposed the burden of proof not on Ms Botha, who was complaining of the unfairness, but on the respondent Trust whose enforcement of the contractual cancellation clause she was seeking to restrain.[259] The Court assumed, in the absence of evidence to the contrary, that the Trust's enforcement of the cancellation clause was *un*fair – and on that basis found for Ms Botha.[260] That is an eccentric approach to the burden of proof, and the opposite of the one taken in *Barkhuizen*, *Bredenkamp*, and now *Beadica*, whose return to normality should be welcomed.[261]

Even accepting the principle, however, there are important questions about how to apply it. Though we can agree that the Court ought to reach decisions only if these are justified by the evidence provided, it does not follow that Beadica's initial failure to provide the evidence should prove fatal. For one should remember that the Court has occasionally shown a willingness to request new argument, and sometimes even new evidence, to allow it to deal with cases where there is an important issue at stake but a lack of information upon which to decide it.[262] When one remembers that *Barkhuizen* itself was seriously hamstrung by the vanishingly slender

[253] Ibid at para 95.

[254] *Barkhuizen CC* (note 34 above) at para 58; also paras 84–86.

[255] *Bredenkamp* (note 18 above) at paras 45–49; *Pridwin SCA* (note 20 above) at para 27.

[256] *Beadica CC* (note 2 above) at para 92.

[257] Arguably there is a difference between the relevant non-compliance in these cases. In *Botha* the non-compliance was with a primary obligation, in virtue of which the other party's (secondary) right to cancel was triggered. The validity of the secondary right to cancel, not the primary obligation with which the complainant had failed to comply, was the subject of the litigation. In *Barkhuizen* and *Beadica*, by contrast, the subject of the litigation was the validity of the very clause with which the complainant had failed to comply. No doubt the complainant's reasons for non-compliance (or lack thereof) should matter in all three cases, but perhaps not in the same way.

[258] See *Botha* respondent heads at para 43, available at https://collections.concourt.org.za/bitstream/handle/20.500.12144/3733/Respondents%27 Heads of Argument-21473.pdf?sequence=6&isAllowed=y.

[259] 'The Trustees', Nkabinde J explained, 'did not properly address the disproportionate burden their claim for relief would have on Ms Botha. … That was a fundamental error.' For it meant that the Trustees 'could not justify this Court's awarding the relief they sought'. See *Botha* (note 6 above) at para 51.

[260] Ibid at para 51.

[261] S Thompson 'Beadica 231 CC: An End to the Trilogy?' (2020) 137 *South African Law Journal* 641, 654–655.

[262] The most famous example is probably *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO, South African Social Security Agency* [2013] ZACC 42, 2014 (1) SA 604 (CC), though the stakes there were incomparably higher.

statement of case,[263] and that in *Everfresh* the Court was unable to develop the common law in a pro-good faith direction because of a lack of argument,[264] one might say it was high time for the Court to take procedural steps to allow it to decide a contractual fairness case properly.[265]

A related question is whether there truly *was* a lack of information to justify intervening in *Beadica*. Neither Davis J in the High Court nor Froneman J in his Constitutional Court dissent thought so. Davis J said he was 'not sure what more is required [of Beadica] in these circumstances'.[266] Beadica had stated in its founding affidavit, as we have seen, that they were unsophisticated business persons and were unaware of the lease's terms. Mr Sale apparently met this allegation with a bare denial,[267] which seems to fall short of creating a material dispute of fact.[268] That being so, the court had no reason to disbelieve Beadica's claims of ignorance.[269] As Froneman J put it, then, Beadica's explanation 'was not contradicted by any direct evidence'.[270] And besides, he continues – and this seems to me his crucial point – 'there is enough circumstantial evidence to back up their contention'.[271] The letters in which Beadica sought renewal were, as Davis J and Froneman J noted, 'informal'[272] and 'somewhat crude'.[273] That is not really surprising; the applicants were dealers in building equipment, and had acquired an ownership role only because of a scheme designed to empower those previously disadvantaged.[274] It seems clear that they – unlike Mr Sale – had no legal representation.[275] And their counterparty was their former boss, now franchisor, on whose favour their businesses depended. Is it not overwhelmingly likely that he and his lawyers were in control of the terms of the agreements, the details of which Beadica remained ignorant until it was too late? To say that the Court lacked the evidence from which to draw the necessary conclusions may indeed seem, as Froneman J put it, to be 'closing one's eyes to reality'.[276]

[263] Mr Barkhuizen's 'spartan' statement of case is quoted in *Barkhuizen CC* (note 34 above) at para 121. That it seriously hampered the adjudication of his claim is clear from, for example, *Barkhuizen SCA* (note 115) at paras 8–9; *Barkhuizen CC* (note 34 above) at paras 84–88.

[264] *Everfresh* (note 58 above).

[265] Some of the judges in *Everfresh* were in fact willing to take such steps: see the dissenting judgment of Yacoob J, which was concurred in by (among others) Froneman J and Mogoeng J. Perhaps tellingly, those who were not willing included Jafta J and Khampepe J.

[266] *Beadica HC* (note 4 above) at para 38.

[267] Ibid at para 27.

[268] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51, 1984 (3) SA 623 (A) at 634–635.

[269] True, Lewis JA held in the SCA that Beadica must have been aware of the terms of the renewal clause, since they tried to exercise it, albeit late; and Theron J quoted this passage approvingly: *Beadica SCA* (note 12 above) at para 39; *Beadica CC* (note 2 above) at para 93. But this is not convincing. First, that Beadica sought renewal *after* the deadline had passed cannot show they knew about the renewal clause when it mattered. Second, and more fundamentally, it is in fact doubtful that Beadica was aware of the clause at any point. In their letters requesting a new lease, they made no mention of it; the reason they gave for their request was only that the termination date for the old lease was looming. This conspicuous failure to mention the renewal clause is at least compatible with Beadica's ignorance of it.

[270] *Beadica CC* (note 2 above) at para 196.

[271] Ibid at para 196.

[272] Ibid at para 198.

[273] *Beadica HC* (note 4 above) at para 38.

[274] *Beadica CC* (note 2 above) at para 197.

[275] At least, not at the time they sought renewal: ibid at para 198.

[276] Ibid at para 197.

After all, the facts of modern-day contracting put much pressure on the presumption that all terms ought to be enforced. The stronger party often imposes terms on the other party that the other party has not read, cannot be expected to read, and would not be able to change even if he did read them. This makes it doubtful whether such terms are really voluntarily agreed, and courts need to police their validity accordingly: the terms are already on the back foot, many would say, and it should not take much from the complainant to push them over the edge. This kind of sentiment was apparent in Sachs J's judgment in *Barkhuizen*, which made much of the fact that the time-bar clause was contained in a standard form contract, and for that reason he was willing to invalidate it despite the dearth of evidence about Mr Barkhuizen's conduct and circumstances.[277] It is a sentiment that Davis J and Froneman J seem to share. So it is not surprising that they felt able to breathe life into Beadica's skeletal averment.[278] Although the renewal clause was not a standard term, it seems to have sufficed, in their view, that it was not meaningfully negotiated.

On the other hand, this line of objection may rely on too much speculation. Surely it is for the complainant to say at least something about the circumstances in which the contract was concluded. These are simple facts, well within Beadica's knowledge, and which previous case law shows to be vitally important.[279] All it did, instead, was faintly profess its lack of savvy. Should an applicant really be allowed, through a single-sentence averment, not tested in evidence, to claim for itself the status of a vulnerable person, entitled to a judicial thumb on the scales? Some may find the approach of Davis J and Froneman J far too credulous. We do not know very much about how vulnerable Beadica really was, and it could not have been all that difficult for it to tell us. What we do know is that Beadica was able to pursue not one, but two, court applications against Mr Sale to appellate level (and, as far as one can tell, it did so by hiring paid lawyers). In addition to the matter I am discussing, it instituted separate litigation against Mr Sale for various alleged breaches of the parties' franchise agreement.[280] It lost that case in the High Court, which refused leave to appeal. Beadica then sought special leave from the SCA, which also refused. After that, Beadica applied to the SCA once again, to have its refusal of special leave reconsidered. The SCA did reconsider it, after full argument, but unanimously dismissed the application – and its discussion suggests that Beadica's claims had much vituperative force behind them, but not much law. So should we really cue the violins for poor Beadica's plight? Or be thankful that, faced with a litigious opportunist, a majority of the Constitutional Court refused to be taken for a ride?

[277] Consider paras 106–111 (Moseneke DCJ), and for discussion Sutherland (note 230 above) at 60–66.

[278] Once again, it is worth remembering the Court's approach elsewhere. In *Sarrahwitz v Maritz NO* [2015] ZACC 14, 2015 (4) SA 491 (CC), the Court unanimously overlooked some grave deficiencies in the applicant's conduct of the litigation and found for her, with Mogoeng CJ saying (at para 27), 'It does become necessary at times to read the papers of a party – especially a vulnerable litigant – with a measure of compassion, when it is in the interests of justice to do so.' Cameron J and Froneman J wrote a separate concurrence; they agreed with the result but would have preferred a solution different from the majority's. Theirs included asking for additional evidence to address a gap in Ms Sarrahwitz's case: ibid at para 99.

[279] Moreover, Beadica had lost in the SCA because its explanation for failing to comply with the notice period was inadequate, but, despite this, its heads of argument in the Constitutional Court made no attempt to plug the gap. Rather, its counsel tried to pivot away from the issue, arguing that the absence of an explanation should not be decisive against it (see para 125 ff) – hardly a vote of confidence in the explanation Beadica might have provided. (Of course it may have been too late, as this stage, for Beadica to remedy the paucity of facts. But then it was surely also too late for the Court to invent them.)

[280] *Beadica 231 CC v Sale's Hire CC* (note 225 above).

Either way, the majority's unwillingness to indulge Beadica may tell us something. It evinces a less sympathetic attitude towards this complainant than the Court has shown on other occasions, certainly less than a minority of the Court would have continued to show here. So perhaps we should not expect the Court to drive forward the constitutionalisation of our contract law with the enthusiasm it once did. Or, at any rate, we should not expect it do so unless litigants provide it with more than the smell of an oil rag.

And that brings us to perhaps the most lastingly important question. What *would* have counted as an adequate explanation for Beadica's non-compliance? What sort of reason for non-compliance might a complainant adduce, in other words, to justify a finding that a term's enforcement would be unfair? On one extreme, it would surely suffice if the complainant had failed to give timeous notice because he was comatose: this is the example that Ngcobo J used in *Barkhuizen*.[281] On the other extreme, *Beadica* seems to establish that a mere profession of ignorance of the contract's terms is not sufficient.[282] This seems a sensible conclusion: a party should not be able to evade a clause merely because he did not know about it; it must be the case that he *could not reasonably* have known about it. But then he must provide some explanation of why that was indeed so. A possibly valid explanation, we may infer from *Beadica*, is that the clause was in legalese that would be baffling to him even if he had read it.[283] We may infer this because, as mentioned, one of the reasons Theron J gives for rejecting Beadica's urgings is that the renewal clause was in 'simple, uncomplicated language, which an ordinary person could reasonably be expected to understand'.[284] That holds out the possibility that, if in some future case things are otherwise, *Beadica* can be distinguished, and the complainant's non-compliance with the clause overlooked. Apart from these small points, however, there is much that remains up for grabs.

IV THE FUTURE

So does *Beadica* really mark a newly cautious approach to the development of fairness overrides? That is certainly the judgment's most obvious meaning. But there are also reasons to doubt it. First, as I argued in part II, Theron J's judgment fails in its professed aim of setting out a clear approach to contractual fairness that unifies our two highest courts' jurisprudence. Instead it attempts an implausible rewrite of history. And although her judgment does, almost by accident, endorse the SCA's judgment in *Bredenkamp*, that endorsement is cast in a way that undermines, rather than advances, Harms DP's moderating intent. Second, as I argued in part III, Theron J's dismissal of Beadica's case for lack of evidence means she loses the chance to flesh out her approach in its application. Not much content has been added to *Barkhuizen*.

[281] *Barkhuizen CC* (note 34 above) at para 69.

[282] This is because, as this part has explained, Beadica's argument that it was 'not fully apprised of its rights and obligations' was given such short shrift. The slight wrinkle is that Theron J's judgment covers her bases, leaving us unsure what significance to attach to each. Was Beadica's case rejected because it had failed to prove it was ignorant of the notice period? Or because, even accepting Beadica was ignorant, it *could* easily have informed itself – so that its ignorance failed to establish any unfairness? Theron J offers reasons to doubt both steps in Beadica's argument.

[283] What a court would do if the complainant were altogether illiterate is far from clear. The Court (or a majority of its members) has been willing to say only that this would be a relevant factor in assessing fairness: *Barkhuizen CC* (note 34 above) at para 64.

[284] *Beadica CC* (note 2 above) at para 94.

A Hard case, bland law

I also said that, despite this, the tone of Theron J's judgment is newly moderate; and that its approach to the evidence and arguments is unyielding. She evinces a relative lack of sympathy for Beadica's complaints of unfairness that may be telling. But how telling?

Here it bears emphasis that *Beadica* was a very difficult case in which to justify intervening. Froneman J's minority judgment, though it would have intervened, acknowledges that it was a 'hard call'.[285] That may be an understatement. It was hard not only because of the minimal evidence that Beadica supplied. It was hard because the renewal clause, of whose notice period Beadica now complained, was in fact very favourable to them.[286] It conferred upon them a power to bind Mr Sale to a new contract that was unilateral and 'substantively unqualified'.[287] The sole restriction on their exercise of this power was the notice period – and, even then, there could be no suggestion that a six-month notice period was inherently unfair.[288] So Beadica's complaint was that a clause which gave them a very robust power, through which they could unilaterally bind Mr Sale, should be strengthened even further by the judicial excision of the only restriction on their power – the *ex facie* fair notice period with which they had (without explanation) failed to comply. That is a novel and contestable use of the *Barkhuizen* principle,[289] whose more natural application is to restrain contractual powers that are draconian – not, as here, to overlook a mistake by a party whose contractual powers are already strong enough. Maybe that can be justified.[290] But it requires work.

Moreover, the effect of the court's intervention would be to create a new contract between the parties, rather than (as in many applications of *Barkhuizen*) to restrain the termination of an existing one.[291] That creates both normative and practical problems. The normative problem is this: whereas the effect of a court's restraining cancellation is merely to preserve a contract to which the parties, in arranging their own affairs, have consented, the effect of deeming a renewal is to create a new contract to which the parties have not consented – and which

[285] Ibid at para 109.

[286] Ibid at para 95.

[287] *Beadica HC* (note 4 above) at para 40.

[288] Compare *Beadica SCA* (note 12 above) at para 39.

[289] Boonzaier (note 100 above) at 12; F Botha 'New Developments in the Quest for Fairness in the South African Law of Contract' (2021) 29 *Zeitschrift für Europäisches Privatrecht* 445, 455.

[290] An appealing characterisation of Beadica's claim may be that they were seeking to estop Mr Sale from relying on the (otherwise entirely fair) notice period: compare Boonzaier (note 100 above) at 12; Thompson (note 261 above) at 655–657. This possibility was raised by Beadica in the alternative (see their written submissions at paras 155–156, available at https://collections.concourt.org.za/bitstream/handle/20.500.12144/36616/Applicants%27 Heads of Argument.pdf?sequence=16&isAllowed=y.). As the doctrine of estoppel reminds us, it is crucial to show that Mr Sale had created the impression that the contract would be renewed (or had a responsibility to dispel any such impression and failed to do so) such that it would now be inequitable for him to act inconsistently with it. There is some licence for such a finding in the facts of *Beadica*, since the parties' franchise agreement perhaps created the expectation of the lease's renewal (compare *Beadica HC* (note 4 above) at para 40), and Mr Sale did not respond to the renewal request for four months, despite implying that he would – possibly a deliberate way to foreclose Beadica's options (compare *Beadica CC* (note 2 above) at para 200). Even so, finding for Beadica on this basis would be a stretch: see Botha (note 289 above) at 456. Nevertheless, the key point is that doctrines like estoppel are at least asking the right questions.

[291] This is noted (passingly) by both Lewis JA and Theron J: *Beadica SCA* (note 12 above) at para 42; *Beadica CC* (note 2 above) at para 97.

they probably did not even expect.[292] The concomitant practical problem is that, because the contract is one imposed by the court, rather than assented to by the parties, it is difficult to determine what its terms should be. The court cannot easily, or fairly, invent them.

Again, it may have been possible to address these problems – the facts of *Beadica* were in important respects special[293] – and it is not my purpose to argue otherwise. Nevertheless, they entail some criticism of the minority judgments in *Beadica*, which do not address them and in fact obscure them.[294]

They also remind us, incidentally, of the unfortunate fact that the Court refused to hear an appeal in *Mohamed's Leisure (Pty) Ltd v Southern Sun*.[295] This was a case in which, as in *Beadica*, the SCA was unwilling to apply the *Barkhuizen* principle to ensure greater fairness – but which, quite unlike *Beadica*, concerned *Barkhuizen*'s most familiar domain of application, namely the restraint of a purported cancellation,[296] and which, also unlike *Beadica*, was amply evidenced. At issue was the cancellation of a lease of commercial premises out of which the complainant had been operating since 1982. The reason the lessor sought cancellation was that the complainant had twice fallen into arrears. But the total period in which it had been in arrears was a matter of days. Moreover, the evidence undisputedly showed that this had been entirely the fault of the complainant's bank, which had twice failed, despite the complainant's most diligent efforts, to effect the necessary transfer. On both occasions the complainant acted

[292] Compare *Gouws NO v BBH Petroleum (Pty) Ltd* (note 72 above) at para 54 (rejecting Davis J's approach for similar reasons).

[293] The two problems I mentioned explain why a legal system ought to preserve the distinction between restraining cancellation and deeming a renewal, and to be more willing, in general, to do the former. But that may be consistent with making exceptions in particular cases, and perhaps *Beadica* ought to have been one of them: on its unusual facts, arguably both of the problems can be solved. This finds some resonance in the judgment of Davis J: see *Beadica HC* (note 4 above) especially at para 36. The parties' 10-year franchise agreement, to which their lease agreement was concomitant, clearly showed that they envisaged their relationship might endure for a further five years; and indeed they had agreed to confer upon Beadica a unilateral power to ensure that it would endure. So Mr Sale arguably could not complain that the Court was imposing a contract on him to which he had not assented. In addition, the old lease (since it anticipated the possible renewal by Beadica) stipulated a mechanism by which to determine the new lease's terms (ibid at para 19). Thus the Court could effectuate a renewal without practical difficulty. One might even say that, looking at 'the substance of the two agreements read together' (ibid at para 43), this was more like the preservation of the parties' own contractual relationship than the deeming of a new one.

[294] Indeed Victor AJ at one point wrongly describes the issue as whether to allow 'the cancellation of the lease': *Beadica CC* (note 2 above) at para 230. Froneman J's judgment is more careful, and yet in large part misdirected, because it fails to identify the kind of unfairness that was at issue. Over the course of several paragraphs, he urges that our courts have the power to police the fairness of the 'exchange' between the parties: ibid at paras 114–127, 187–188. But here there was simply no unfairness in the exchange (at any rate, Beadica claimed none). No doubt Mr Sale's conduct, in the course of implementing the parties' contract, may have been unfair. But that is a different normative basis for intervening, which needs proper articulation. (Also misdirected, for similar reasons, is Froneman J's comparison (at paras 185–187) with § 138 of the German *BGB*, which concerns the invalidation of unfair contracts. This contract was not unfair, and it was essential to Beadica's case that it remain valid, since it contained the renewal clause they claimed to have exercised. Their attempt to restrain Mr Sale's unfair conduct would be a matter not for § 138 but for § 242.) It is admirable that Froneman J tried to develop the *Barkhuizen* test so that it provides more structured answers (see especially his three criteria at para 187), but the attempt is doomed unless one has identified the right questions.

[295] *Mohamed's Leisure* (note 20 above). The Constitutional Court dismissed the application for leave to appeal (CCT 335/17) on 21 February 2018.

[296] See further text at notes 305–313 below.

swiftly to rectify the bank's error (and it had failed to prevent the bank's second error only because the bank misled it, saying wrongly that the instalment had already been paid). The High Court readily intervened to prevent cancellation, applying *Barkhuizen*.[297] But the SCA unanimously upheld an appeal by the lessor, with fatal effects for the complainant's business. It reasoned, as ever, that there was simply no public policy basis upon which to intervene.[298] One commentator said the SCA's decision 'reflects the old conservatism of 2002 and indeed of 1988',[299] and it is hard to disagree. Certainly, the facts presented a far stronger case for intervention than in *Beadica*, and would have been a far better vehicle for the consideration of our law on contractual fairness controls. That the Court refused even to hear an appeal in *Mohamed's Leisure* – though three of its members would have *upheld* the appeal on the much weaker facts of *Beadica* – is both a puzzle and a pity.

But the main point to highlight here is simply this: that *Beadica* was a weak case should qualify our assessment of the majority judgment. It gives us reason to doubt that judgment's lasting impact. On the facts of *Beadica* what the majority does is emphatically reject the complainant's demands for judicial intervention. Yet the Court was being asked to overcome all of the justificatory hurdles that I have set out in this part, even in the face of the dearth of evidence that I emphasised in the previous one. So perhaps we should conclude only that the current Court is not quite as adventurous as it appeared after *Botha*, but infer very little beyond than that. If some future case is even slightly stronger on the law than *Beadica*, or slightly better evidenced, then it may not be surprising if the Court wishes to intervene. And, if it does, then the weak facts of *Beadica* can be easily distinguished. No doubt the Court's rhetoric, which I discussed in part IIC, goes wider than this. But perhaps the Court was – not for the first time – using unnecessarily grand rhetoric to ennoble what was, in fact, an unremarkable result.

In upshot, then, there may be a third reason to doubt whether *Beadica* marks a lasting retreat by the Court from its ambitious constitutionalisation of our contract law.

B Misdirected application and Schrödinger's contract

But it is the fourth and final reason for doubt, which I discuss in what remains of this article, that may be the most important. That reason is *Pridwin*. There a majority of the Court, again per Theron J,[300] resolved a complaint about contractual unfairness, but on this occasion it did so without applying *Barkhuizen*'s public policy test. Theron J considered it to be irrelevant in *Pridwin* because that case involved what she called the 'direct application' of the Constitution. On this basis she found for the complainant, and restrained the other party's enforcement of a contract term – and yet did not consider the requirements of *Barkhuizen* at all. If this is the start of a new trend, then whatever restraints *Beadica* introduced into the *Barkhuizen* principle will count for very little: complainants now have a way to bypass them.

Pridwin arose from a dispute between a Mr B and the Johannesburg preparatory school his two sons attended. The school, Pridwin, provided tuition to the boys in terms of a 'parent

[297] *Mohamed's Leisure Holdings v Southern Sun Hotel Interests (Pty) Ltd* [2016] ZAGPJHC 303, 2017 (4) SA 243 (GJ).
[298] *Mohamed's Leisure* (note 20 above) especially at paras 28–30.
[299] A Hutchison 'Good Faith in Contract: A Uniquely South African Perspective' (2019) 1 *Journal of Commonwealth Law* 1, 12.
[300] Jafta J, Khampepe J, Ledwaba AJ, Madlanga J and Mhlantla J concurred. Thus Jafta J, Khampepe J, Mhlantla J, and Theron J form the bloc which was common to the majority in both *Beadica* and *Pridwin*. (Madlanga J dissented in *Beadica*, and Ledwaba AJ did not sit.)

contract' it had agreed with Mr B and his wife. It sought to terminate that contract after a long series of altercations with Mr B, whose *casus belli* was his sons' cricket matches. Convinced his sons were being mistreated, he became verbally abusive to the umpires and especially to Pridwin staff, to whom he made threats of physical violence. The school came to an arrangement with Mr B that was intended to avoid such incidents in future, but after Mr B broke its conditions, and again became hostile at his son's sporting event, the school ran out of patience. It purported to cancel the parent contract in reliance upon the agreed cancellation clause, which entitled either party 'to cancel this contract at any time, for any reason', upon one term's written notice.[301]

Although there could be little doubt that Mr B's conduct was intolerably extreme, cancellation would result in his sons having to leave the school. This significant impact upon the third parties whom the contract sought to benefit was the genesis of Mr B's court application. He argued that the cancellation was impermissible because it infringed the boys' constitutional rights to basic education and to have their best interests considered.[302] He lost resoundingly in the High Court[303] and – as we have seen – in the SCA.[304] But the Constitutional Court was more receptive.

To make the case that Pridwin had infringed the boys' rights took some work, because it was a private school, and therefore did not obviously have a constitutional duty to provide the boys with schooling. There was also the interesting and unusual feature of the case that the rights at stake were not those of Mr B, the contracting party who sought to restrain his counterparty's exercise of the cancellation clause, but of his dependents. Nevertheless, the case seemed squarely a matter for the *Barkhuizen* principle: the parties had agreed a contract, a term of which gave Pridwin a robust power; and Mr B sought to invalidate that term (or its enforcement) on the basis that it would have an impact that was unfair. Moreover, the particular power at issue – the power of cancellation – has been by far the most frequently addressed issue under *Barkhuizen*.[305] It generated the litigation in *Maphango*[306] and of course in *Botha*,[307] both of which reached the Constitutional Court.[308] The same issue was central to *Bredenkamp*, which resulted in Harms DP's landmark judgment in 2010,[309] and has now reached the SCA a further three times in the last three years: in *Mohamed's Leisure*,[310] *Louw v Davids*,[311] and *Liberty*

[301] The contract also stated elsewhere, presumably *ex abundante cautela*, that the school was entitled to cancel the contract on certain enumerated grounds, which included the parent's serious non-cooperation with the school and behaviour by him negatively affecting the well-being of staff.

[302] Constitution of the Republic of South Africa, 1996, sections 28–29.

[303] *AB v Pridwin Preparatory School* [2017] ZAGPJHC 186 (Hartford AJ).

[304] Notes 30–32 above.

[305] Compare J du Plessis 'Giving Practical Effect to Good Faith in the Law of Contract' (2018) 29 *Stellenbosch Law Review* 379, 404 (the question of which grounds may be relied upon to restrain cancellation under *Barkhuizen* 'lies at the epicentre of debates on the future of our law of contract').

[306] *Maphango* (note 52 above).

[307] *Botha* (note 6 above).

[308] In *Maphango*, however, a majority of the Court decided to remit the matter to the Rental Housing Tribunal. The minority would have applied *Barkhuizen*. See *Maphango v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2, 2012 (3) SA 531 (CC).

[309] *Bredenkamp* (note 18 above).

[310] *Mohamed's Leisure* (note 20 above).

[311] *Louw v Davids* (note 101 above).

Group.[312] And it has also yielded some of the most consequential High Court judgments to apply *Barkhuizen*.[313] In some of these cases, the complainant was successful, and in others not. But there was no doubt that the right way to adjudicate them was under the *Barkhuizen* principle. And that was, of course, the way the lower courts had adjudicated *Pridwin*.[314] The minority in the Constitutional Court would have done the same.[315]

Theron J decided for the majority, however, that the *Barkhuizen* principle was irrelevant. Though in *Beadica*, decided on the same day as *Pridwin*, she had spent 103 paragraphs comprehensively setting out the law on that principle, she said *Pridwin* was different and so none of it applied. Here are the crucial passages of her reasoning, which urges a distinction between two claims – one about the enforcement of the contract in light of *Barkhuizen*'s public policy test, and the other about the boys' constitutional rights:

> [T]he claim based on public policy is directed, not at upholding the constitutional rights of the boys, but at the School's enforcement of the Parent Contract and the potential invalidity of [the cancellation clause]. This claim is contractual in nature … It is about the enforcement of a contractual term.[316]

By contrast:

> The claim relating to the constitutional validity of the decision to terminate the Parent Contract is directed at upholding the boys' constitutional rights. This claim is grounded in Pridwin's obligation not to breach the boys' rights in sections 28(2) and 29(1) of the Constitution, which flow directly from the Constitution and operate independently from the contract.[317]

On this basis, Theron J says that applying *Barkhuizen*'s public policy test in this case 'conflates two different approaches'.[318] In truth, 'there is no need to determine the public policy challenge'; one should give effect to the second claim, based on the boys' constitutional rights, instead.[319]

This reasoning is puzzling.[320] The key move in the quotation is left unjustified. Theron J gives no valid reason, in other words, why the fact that the boys' constitutional rights 'operate independently from the contract'. Merely pointing out that the boys' constitutional rights and the enforcement of the parent contract are two different things does not establish that they operate independently. And indeed every indication had been that they *do not* operate independently: the applicant's case was that Pridwin's invocation of the cancellation clause was invalid *because* of its effect on the boys' constitutional rights; he invoked the boys' constitutional rights *in order* to restrain the enforcement of Pridwin's contractual power. The two issues seemed therefore to be closely interdependent – and both squarely matters for *Barkhuizen*.

[312] *Liberty Group* (note 145 above).

[313] *Combined Developers v Arun Holdings* [2013] ZAWCHC 132, 2015 (3) SA 215 (WCC) (which does not cite *Barkhuizen*, but clearly means to apply it).

[314] Their shared conclusion that the school's cancellation infringed no constitutional rights meant, however, that the *Barkhuizen* complaint got no traction.

[315] Nicholls AJ (Mogoeng CJ, Cameron J, and Froneman J concurring).

[316] *Pridwin CC* (note 1 above) at para 103.

[317] Ibid. Mocumie JA, in her dissent in the SCA, had drawn a similar distinction when explaining the argument of Mr B's counsel, who perhaps wanted, for strategic reasons, to skirt around rather than confront the normative force of *pacta sunt servanda*. See *Pridwin SCA* (note 20 above) at para 88.

[318] *Pridwin CC* (note 1 above) at para 102.

[319] Ibid at para 107; see also para 130.

[320] For critiques paralleling my own see M Finn 'Befriending the Bogeyman: Horizontal Application in *AB v Pridwin*' (2020) 138 *South African Law Journal* 591; N Ally & D Linde '*AB v Pridwin Preparatory School*: Private School Contracts, the Bill of Rights and a Missed Opportunity' (2021) 11 *Constitutional Court Review* 275.

It is especially strange Theron J thought that Mr B's invocation of constitutional rights took his case *outside* the remit of *Barkhuizen*, since that is exactly what *Barkhuizen* involved. Mr Barkhuizen had argued that the time-bar clause infringed his right of access to court and was, for that reason, contrary to public policy. As I have said many times before, it was only after the Court had found that the clause infringed that right that it invoked its fairness test at the second step; indeed it was this infringement of a constitutional right that triggered the public policy test's application. Yet somehow Theron J claims in *Pridwin* (citing *Barkhuizen*) that Mr B's reliance on a constitutional right is what makes that test *irrelevant*.

So how does Theron J end up endorsing a position so perplexing? It seems to be a result of our muddled debate about the 'direct' and 'indirect' horizontal application of constitutional rights – and of the fact that *Barkhuizen* said, confusingly, it was doing the latter.

The problem is that we have tended to conflate two different senses in which horizontal application may be 'direct' or 'indirect',[321] which in *Pridwin* comes to a head. The first sense picks out two different techniques by which a constitutional principle can be given horizontal effect. 'Direct application' means applying constitutional norms to the parties' conduct without intermediation. 'Indirect application' means applying constitutional norms to an intermediate legal rule (statute or, more relevantly here, the common law), which is then applied, in turn, to parties' conduct. The right triggers a development of the common law, and the common law, as developed, is what regulates the parties' conduct. Though this sense of the distinction is widely used in South Africa, it tends to be conflated with another. On this second understanding, direct and indirect application are associated with two different things that one might apply: 'direct application' is the application of constitutional rights themselves, and 'indirect application' is the application not of the rights themselves but of the values underlying them.[322]

One can understand how the direct/indirect terminology seems a fitting way of marking this new distinction: the application of the rights themselves may be contrasted with their having effect only through the values that underlie them – that is, 'indirectly'. Nevertheless, this second distinction is plainly different from the first. It is about *what* is being applied (the rights or their underlying values?), whereas the previous distinction is about *how* they are being applied (through the common law or not?). It is important that the two questions are kept separate. One reason is that it is entirely possible for constitutional rights themselves to apply to a dispute via the intermediation of the common law. That is, 'direct' application (in the second sense) might occur 'indirectly' (in the first sense). But one will overlook this possibility if one is not alive to the equivocation to which the direct/indirect terminology is prone: one will be misled into thinking that the right itself *must always* apply directly in the first sense, i.e. without the intermediation of the common law. That would be an especially alarming error because our Bill of Rights arguably does not authorise direct application in the first sense at all.

[321] See further D Bhana 'The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution' (2013) 29 *South African Journal on Human Rights* 351, 355–359; N Friedman 'The South African Common Law and the Constitution: Revisiting Horizontality' (2014) 30 *South African Journal on Human Rights* 63, especially his rejection of the 'Dichotomy Thesis'; F du Bois 'Contractual Obligation and the Journey from Natural Law to Constitutional Law' (2015) *Acta Juridica* 281, 292.

[322] The conflation happened almost immediately, because in Germany, whence the distinctions derive, constitutional rights can have horizontal effect only through the influence of their underlying values upon the common law. In Germany, in other words, the two senses of 'indirect' always coincide – meaning it is easy, but also relatively costless, to conflate them. In South Africa, they do not coincide – so conflating them is not costless.

Both of its application sections[323] – namely s 8(2), which authorises application of the rights themselves, and s 39(2), which authorises application of the values underlying them – expressly say that application is to occur by means of a development of the common law.[324]

Unfortunately, this seems to be precisely the error that Theron J commits.[325] She recognises, correctly, that Mr B is invoking his sons' constitutional rights, rather than the values underlying them. She then infers, also correctly,[326] that the natural way to give effect to these rights, as against private parties, is s 8(2) of the Constitution. Because s 8(2) is associated with 'direct application', however, Theron J believes she has hereby offered a reason to reject its opposite. And since Ngcobo J in *Barkhuizen* claimed to be using 'indirect application' when he devised his public policy test, Theron J concludes that the public policy test must be inapposite here.

But at the heart of this reasoning is a mistake. It runs together the two distinct meanings of direct/indirect application. *Barkhuizen*'s public policy test is an instance of indirect application in the sense that it mediates the application of the Bill of Rights through a common-law rule. But it is not an instance of indirect application in the other sense. It does not in any way preclude, in other words, the application of constitutional rights themselves (as opposed to the values underlying them). Quite the contrary: *Barkhuizen* patently relied upon the constitutional right of access to court itself. That Ngcobo J sought to give effect to it *by means of* a development of the common law's public policy test does not change that.

Admittedly *Barkhuizen* expresses itself poorly about this. That judgment itself falls prey to the ambiguities in the direct/indirect terminology, and engages in a damaging tussle with section 36's 'law of general application' requirement besides.[327] Its pertinent weakness here is that it relies upon s 39(2) and forsakes what it calls, without disambiguation, 'direct application' under s 8. As commentators noted in the immediate wake of the decision, this was at odds with what Ngcobo J was doing in substance: namely, giving horizontal effect to a specific

[323] I leave aside the possibility that indirect (i.e. unmediated) application may be licenced (or indeed required) by *other* sections, such as sections 38 and 172, which empower courts to provide a remedy perhaps even where the common law does not. See Finn (note 320 above) at 594. I also leave to one side the question of whether the judicial creation of a brand-new cause of action, under the impetus of the Constitution, should be considered a form of mediated application (since the cause of action, once created by the court, is the common law through which the Constitution is mediated) or unmediated (since, before the court's decision, there is *ex hypothesi* no common law on the matter). Neither possibility is relevant to *Pridwin*, since Theron J invoked s 8 instead of an existing common-law mechanism, viz. the *Barkhuizen* test.

[324] Section 39(2) is especially clear, since it begins, 'When developing the common law …'. Section 8 is very slightly less clear, but s 8(3) seems more than clear enough. That the application of rights under s 8 takes place by means of common-law development was unanimously affirmed by the Constitutional Court in *Khumalo v Holomisa* [2002] ZACC 12; see especially paras 31, 33. Such was the terminological and conceptual muddle about direct/indirect application, however, that some failed to see this affirmation for what it was. They thought that, since O'Regan J relied on s 8, she was endorsing direct application in both senses.

[325] This is how I understand the reasoning expressed in *Pridwin CC* (note 1 above) at paras 105–107, 122.

[326] Or so we can grant here. If Theron J is indeed right about this, it may cause trouble for her view (stated in *Pridwin CC* at para 197) that s 36, the general limitations clause, is not engaged – since the Constitution is explicit that s 8 and s 36 are interlinked. She attempts to head off this trouble by importing the internal limitation standard of 'appropriate justification', on the prospects of which see Finn (note 320 above) at 605.

[327] The conclusion he reaches on this point – that there was no relevant 'law of general application' – is the main respect in which Ngcobo J's *Barkhuizen* judgment seems outright wrong, rather than merely poorly expressed: see S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762, 775. But that, ironically, is virtually the sole point from Ngcobo J's judgment which Theron J follows: *Pridwin CC* (note 1 above) at para 197.

constitutional right through the intermediation of the common-law public policy test.[328] It is most unfortunate that Theron J nevertheless doubles down on *Barkhuizen*'s errors, rather than straightening them out, and indeed uses them to confect a newly damaging conclusion. She says that, if the complainant is relying on a constitutional right to restrain the exercise of a contractual power, one cannot use *Barkhuizen*'s public policy test. That is a fallacy which *Barkhuizen* does not even remotely support.[329]

One of the most puzzling features of *Pridwin* is that *Beadica*, handed down by the same judge on the same day, seems fully in tune with these points I have been making. In *Beadica* Theron J says, citing *Barkhuizen*: 'Constitutional rights apply through a process of indirect horizontality to contracts.'[330] That seems to me an entirely accurate account of *Barkhuizen* (with 'indirect' here meaning, necessarily, mediated via the common law).[331] And *Beadica* accordingly goes on to adjudicate the complainant's aforementioned argument – that enforcement of the notice period against them, as black-owned businesses, would infringe their constitutional right to equality in section 9(2)[332] – through the public policy test.[333] But that makes it only more mysterious why *Pridwin* says that, in order to apply constitutional rights to the parties' contractual dispute, one must use *direct* application – and to support this reasoning engages in a lengthy discussion of *Barkhuizen*.

Adding to the puzzle is the fact that in *Beadica* Theron J explained there were powerful normative reasons for channelling the impact of constitutional rights through the common law.[334] The main one is that it avoids parallelism, in other words the unnecessary creation of a duplicative 'constitutional' cause of action alongside an existing common-law one. For this Theron J cited, predictably, the Court's celebrated judgment in *Pharmaceutical Manufacturers*, which condemned the creation of two parallel systems of law – one constitutional, one common law.[335] Much better to integrate the two perspectives: constitutional imperatives must be made effective, but that should be done by reforming the common law 'within its own paradigm'.[336] By forsaking all of this in *Pridwin*, however, the Court seems to have created the parallel cause of action that in *Beadica* it rightly deplored.[337]

In short: despite Theron J's strenuous urging that she is undertaking 'direct application' of the two boys' rights in terms of s 8, there is no reason why she could not have done so via *Barkhuizen*'s public policy test. This provided a perfectly good common-law framework within

[328] Woolman (note 327) at 777–778; PJ Sutherland 'Ensuring Contractual Fairness in Consumer Contracts after Barkhuizen v Napier – Part 1' (2008) 19 *Stellenbosch Law Review* 390, 402–403.

[329] It is all the more striking, therefore, that Theron J accuses the minority, which channelled its rights analysis through the existing *Barkhuizen* test, of confusedly adopting a 'novel approach' (at para 102).

[330] *Beadica CC* (note 2 above) at para 71.

[331] It must mean this, because it cannot mean the other sense of 'indirect': that would be incompatible with the fact that 'constitutional rights' (not the values underlying them) is the subject of the sentence.

[332] See part IIIA above.

[333] See again *Beadica CC* (note 2 above) at paras 99–102.

[334] Ibid at para 71 ff.

[335] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1, 2000 (2) SA 674 (CC) at para 44, cited in *Beadica CC* (note 2 above) at para 71.

[336] *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC) at para 55, the preceding paragraph of which is quoted in *Beadica CC* (note 2 above) at para 75. See for relevant discussion Ally & Linde (note 320 above) 20 ff.

[337] Indeed the judgment circumvents two further mechanisms which ought to take precedence over unmediated reliance on the Constitution: see Finn (note 320 above) at 601–602.

which to adjudicate the claim in *Pridwin* – one with at least a century-long pedigree, and one which has been debated and developed with special vigour for the last fifteen years. Had Theron J used it, the result in *Pridwin* would surely have been the same;[338] she would have been amply justified in taking a robust approach to the clause at issue. Indeed *Barkhuizen* may have helped to highlight some reasons why: the cancellation clause formed part of the standard terms imposed by the school,[339] the relationship between schools and those who wish to attend them is (arguably) one of unequal bargaining power,[340] and this clause had not (only) been used unfairly in the particular circumstances but was manifestly overbroad *ex facie*.[341]

Theron J's choice to circumvent the public policy test may cause real problems in future. The Court has fared badly with parallel causes of action in other contexts, most notoriously the bifurcation in administrative law between the Promotion of Administrative Justice Act[342] and the principle of legality.[343] But it seems the Court's extraordinary appetite for procedural wrangling remains unsated,[344] and that fairness in contract may be its next victim. The danger is especially acute because, as I have argued, *Pridwin*'s account of how to distinguish the two kinds of claim is incoherent. If one is seeking to restrain the exercise of a contractual power on the basis of a constitutional right, does one use *Barkhuizen* – which seemed the obviously correct route hitherto – or *Pridwin*'s new approach? It is not easy to answer this question sensibly. And it may therefore turn out that – rather than consolidating our jurisprudence on fairness in contract, as *Beadica* claimed – the Court has fractured it.

C Conclusion: All quiet?

That the Court's stated reasons for doing this are uniformly fallacious is not a point I will continue to labour. The point I am building towards is only this: one cannot assess *Beadica*'s lasting impact without paying close attention to *Pridwin*. For consider: *Pridwin* decides that, where one contracting party wishes to restrain the exercise of the other's contractual power on the basis of constitutional imperatives, he need not rely on the *Barkhuizen* principle to do so. He may, instead, use *Pridwin*'s alternative approach. And, as *Pridwin* illustrates, a party may, by that alternative route, successfully restrain the other's exercise of a contractual power, without having to pass the public policy test at all. Nor is any mention made of the cautions Theron J urged in *Beadica*: there is no mention of *pacta sunt servanda*, the fact that intervening in the parties' contractual arrangements is justified only in the clearest of cases, or

[338] Nicholls AJ's minority judgment reached the same conclusion as Theron J about the validity of the school's cancellation by applying (admittedly rather cursorily) the public policy test. She quotes Langa CJ's remarks in *Barkhuizen* that the distinction between the two approaches 'will seldom be outcome determinative', which seems correct: *Barkhuizen CC* (note 34 above) at para 186; *Pridwin CC* (note 1 above) at para 67.

[339] *Barkhuizen CC* (note 34 above), especially the judgment of Sachs J, with whose emphasis on this feature the other judges agreed: see paras 87 (Ngcobo J) and paras 106–108 (Moseneke DCJ).

[340] Ibid at para 59.

[341] Ibid at para 60.

[342] Act 3 of 2000.

[343] See for discussion C Hoexter *Administrative Law in South Africa* (2nd edn, 2012) 131–137.

[344] I am thinking here of cases such as *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31, 2016 (1) SA 132 (CC)(which concocts technical reasons not to adjudicate a compelling rights claim of public importance) and *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40, 2018 (2) SA 23 (CC)(which greatly aggravates, rather than allays, the problem just mentioned at note 343 above), as well as the Court's increasingly opaque jurisprudence on its own jurisdiction, which Eshed Cohen tackles in 'The Jurisdiction of the Constitutional Court' (2021) 11 *Constitutional Court Review* 433.

any of the other restraining imperatives she there so piously invoked. These can be waved away, apparently, if one asserts that constitutional rights 'operate independently' of the contract. And hence the law as laid down by Theron J in *Beadica*, however moderate in appearance, can simply be outflanked.

How should we make sense of these apparently inconsistent attitudes, expressed by the same judge on the same day? Perhaps it is possible to align them, to see them as serving a single strategy. For their combined effect is to reduce the status of the common law-centred public policy test, which *Beadica* grants to be relatively moderate and inhibited, and to carve out a new, purely 'constitutional' mechanism, which Theron J, later in her *Pridwin* judgment, suggests is more 'transformative'.[345] *Beadica* recognised, in other words, that the *Barkhuizen* principle has clear limits, and requires presumptive deference to *pacta sunt servanda*, which may be departed from only after some delicate enquiries. And it attests that, especially in the SCA's hands, the *Barkhuizen* principle has not wrought major changes to our law. If *Beadica* stood alone, then, one might think the Court has settled into a new mode of caution. But perhaps the inference the Court in fact draws from this is that it needs an alternative approach – one less inhibited by the niceties of the common law. And that is where *Pridwin* comes in. There the Court arrogates to itself a new power to intervene in contractual disputes that is unfettered by *Barkhuizen*'s restraints, offering its direct hotline to the Constitution as legitimation. The Court can now decide contractual disputes in a constitutional idiom in which it is more comfortable, and which does not require the same engagement with and indeed deference to the jurisprudence of the SCA. Perhaps *Beadica* reflects not a newly conservative approach to contractual fairness, in other words, but a newly conservative approach *to the common law*. Having reached a newly pessimistic conclusion about achieving contractual fairness 'within [the common law's] own paradigm',[346] the Court has decided to find it elsewhere.

If this is right, then the Court may exploit the route carved out in *Pridwin* again – at least in cases where, as in *Pridwin* itself, its intervention is merited on a basis that feels paradigmatically constitutional[347] – and thus continue to exercise the vigour that its critics fear. *Beadica* may herald a new approach to the constitutionalisation of our contract law, then, but not in the way one might think. The Court has retreated from the extremes to which it once took *Barkhuizen* – but it has also opened a new front.

[345] *Pridwin CC* (note 1 above) at paras 120–121, 127–130. There are many reasons to doubt this suggestion that using s 8 *instead of* the public policy test will be more transformative, but the relevant point here is that this seems (rightly or wrongly) to be the Court's view.

[346] *Carmichele* (note 336 above) at para 55.

[347] This is (obviously) a vague criterion – which in a way is the point. As I said earlier, the workings of the parallel causes of action are likely to be inscrutable. But one imagines the Court will be attracted to *Pridwin*'s directly constitutional route if the complainant can point to the infringement of a constitutional right on which the Court has a rich jurisprudence; and it will not be so attracted if, as in *Beadica*, it either does not wish to intervene or can detect no infringement of a well-worn constitutional right.